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When Rights Embrace Responsibilities
Biocultural Rights of Indigenous Peoples and Local Communities

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All photos have been taken by Giulia Sajeva, in Bwabwata National Park, Namibia, in September 2013.

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Part 1. Introduction and Definitions

Chapter 1.1. *Purpose and Scope of the Research*

> «Often, the campaigns of indigenous communities are misjudged as the ignorance of "primitives" unschooled in modern economic realities. But make no mistake. We are not peoples of the past – we are your contemporaries and in some ways may be your guides towards more sustainable futures in twenty-first century»[1].

The new means of human action and the footprint humankind has on the Earth, necessarily require, as Hans Jonas pointed out, the creation of a new ethic[2]. What he refers to as the *traditional ethic*[3] is not anymore suitable to guide human behaviour because it is not shaped around the understanding of the threat humankind has become for nature. It is indispensable, he argues, a shift toward an ethic of responsibility[4] that understands nature as something given in custody to the humankind, something towards which we have a role of custodianship. An ethic that the anthropologist Darrel Posey calls a new *global environmental ethic* able to reverse the devastating cycle that industrialized societies have imposed on the Planet[5].

The present work does not expect to answer to the call for the creation of a new ethic. It instead wants to suggest that there are different *traditional ethics* that may help humankind to find new solutions and methods. As Posey writes, «one approach is to listen to indigenous and traditional leaders who have become effective leaders in the environment and human rights movement»[6]. Rather than having to create something new, their *traditional ethics* require us to move in space, and be inspired by those peoples and communities, our contemporaries, whose ethic and legal traditions place humankind in a custodianship role towards nature.

This thesis explores the meaning and significance of the *theoretical construct*[7] of *biocultural rights*[8] as theorized by Kabir Bavikatte, and partially by Daniel

[1] (Posey, 1999a). This citation is the closing of the Doctoral Thesis by S.K. Bavikatte (2011, p. 242) that so much has inspired my ideas and work. Here I "appropriate" this citation as the opening of my thesis as a symbol of my appreciation for his work and as an auspice for mine.
[2] (Hans Jonas, 1990, p. 12).
[3] (Hans Jonas, 1990, p. 7).
[4] (Hans Jonas, 1990, p. XXVIII).
[5] (Posey, 1999a).
[6] (Posey, 1999a).
[7] I refer to biocultural rights as a *theoretical construct* because they cannot as yet be regarded as rights recognized in international law. Bavikatte and Robinson argue that they are in the

Robinson. They have recently introduced the term to describe a basket of group rights aimed at protecting the stewardship role that certain indigenous peoples and local communities have towards the environment and, they argue, that is emerging from the interpretation of the texts and negotiating documents of multilateral environmental agreements. The theoretical construct of biocultural rights, as proposed by Bavikatte, suggests strategies for claims inspired by non-mainstream ethics aimed at benefiting peoples, communities and the environment. It is not yet the product of a new ethic but it could be a step towards the creation of a new relationships between humankind and the environment.

Biocultural rights still need to be fully understood because they appear as *sui generis* human rights carrying certain characteristics that are typical of human rights discourse as well as others that are difficult to fit into usual categories. Biocultural rights seem to confer (using a Hohfeldian terminology[9]) claims, liberties, immunities and powers to their holders but also, unlike human rights usually do, duties, liabilities and disabilities. This is due to the fact that biocultural rights originate from environmentally related documents and therefore protect not solely the interests of their holders but also those of other subjects. The idea of human rights with attached duties and intrinsic limits for their holders may appear incompatible with the very famous description of human rights as *trumps* proposed by Ronald Dworkin[10]. Is it really incompatible? Who are the other subjects whose interests are protected and what are such interests? Are these other subjects in a position to act as claimants to uphold their interests?

This thesis will also explore the position of local communities and indigenous peoples within the concept of biocultural rights. Both categories are referenced in the texts interpreted by Bavikatte and Robinson, but the rights of the two groups are not equally recognized in international law, so they currently receive differential treatments. How would the recognition of biocultural rights in international law influence communities and peoples? Would the two categories be influenced in the same way? Would such recognition be favourable or detrimental for each of the two categories?

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process of being recognized but further research is needed to determine whether biocultural rights are "emerging" (in the process of being recognised) rights in international law, or whether biocultural rights are still at the stage of a political ideal to be pursued.

[8] The term is inspired by the term *biocultural diversity* that was used by Darrel Posey (Posey, 1999b) to describe the idea of long-term sustainable and mutually beneficial relationships between certain communities and peoples and the environment.

[9] (Hohfeld, 1919).

[10] (Dworkin, 1984).

This thesis analyses some of the unresolved issues of Bavikatte's construction attempting to provide a rational interpretation of his work. In particular, the thesis, after describing Bavikatte's work, reveals some non-explicit implications of Bavikatte's definition, analyses the internal elements of biocultural rights (right-holders, duty-holders, foundations, beneficiaries), and it finally tries to point out the potential positive and negative consequences of formulating claims for biocultural rights in international and national law. Due to the broad nature of the discussion on biocultural rights, and to their complexity, some specific issues will not be explored. It is here hoped to explore them in more detail in the future.

It should be borne in mind that it is a theoretical thesis, an exercise in jurisprudence, and not a thesis in international law. A comprehensive analysis of the potential advantages and downturns of biocultural rights should be combined with an examination of international law, court cases, international negotiations, and on-the-ground experience.

The environmental focus of this research means in no way to justify the mistreatment of peoples or communities that have not preserved sustainable lifestyles. One thing is to claim for the recognition of differentiated rights and another is to claim for the mistreatment of those that do not fall within the specific category to whom those rights are recognized. As recognizing specific rights to indigenous peoples shall not be understood as threatening the rights of non-indigenous minorities, the call for recognition of biocultural rights for those that do have certain environment-related-features shall in no way be assumed to be a justification to threaten the rights of those peoples and communities that do not.

Part 5 is dedicated to a case study on biocultural rights. It reports the still undergoing case of the Khwe, a San indigenous group living in the Bwabwata National Park, in the West Caprivi, Namibia. The Khwe are among the very few indigenous peoples living in a National Park in Southern Africa and are currently struggling for the recognition of the rights over natural resources necessary for the maintenance of their traditional livelihoods and cultural practices. As part of my period as a visiting researcher at Natural Justice*: lawyers for the Environment* (a South African Non-Governmental Organization), I helped to organize and to run the First Workshop with Custodians Committee of Elders & Youth with the Khwe of Bwabwata. The workshop aimed at consulting the Khwe in order to daft a Biocultural Community Protocol, a tool created to help indigenous peoples and local communities to ask for the recognition of their rights over natural resources and traditional knowledge. The claims of the Khwe are an interesting case study

for the present thesis because they can be framed within the theoretical construct of biocultural rights. The Khwe, in fact, seem conscious to be claiming for a *basket* of rights (i.e. right to access, use, manage and protect their traditional lands and natural resources), which embraces a cluster of responsibilities towards the environment.

Chapter 1.2. *The Conservation of the Environment*

Before moving to the discussion about the definition of indigenous peoples and local communities, it is here needed to spend a few words on the main terms of the debate about the conservation of the environment.

The Millennium Ecosystem Assessment[11] is a useful compass within the dynamics of environmental issues, in particular for what concerns the linkages between human wellbeing and ecosystem services. An ecosystem is defined as a «dynamic complex of plant, animal, and microorganism communities and the non-living environment interacting as a functional unit»[12] and its size can range from microbial systems to the whole Earth[13]. Ecosystem services are the sum of the benefits people obtain from ecosystems, at the local and global level. They can include «*provisioning services* such as food, water, timber, and fiber; *regulating services* that affect climate, floods, disease, wastes, and water quality; *cultural services* that provide recreational, aesthetic, and spiritual benefits; and *supporting services* such as soil formation, photosynthesis, and nutrient cycling»[14]. All the services that the environment provides to humankind are dependent on the health and the diversity of an ecosystem: the richer its biological diversity – biodiversity – is, the better services it may provide. Biodiversity is the term used to describe the «variability among living organisms from all sources including, *inter alia*, terrestrial, marine, and other aquatic ecosystems and the ecological complexes of which they are a part; this includes diversity within species and of ecosystems»[15]. Hence, the conservation of biodiversity and the protection of healthy ecosystems are fundamental assets for the wellbeing and survival of humankind.

Today, ecosystems and their diversity are under anthropogenic threat more then ever before. Anthropogenic threats range from habitat destruction, habitat fragmentation and degradation, climate change, overexploitation, introduction of invasive species, and circulation of “exotic” diseases[16]. The Millennium Ecosystem Assessment argues that the degradation of ecosystems and the loss of biodiversity primarily affect the poorest layers of society and contribute to the increase of world inequalities and conflicts[17] and hinder the achievement of the Millennium

[11] The Millennium Ecosystem Assessment is an assessment carried out from 2001 to 2005 by more than 1360 experts about the state and trend of the ecosystems of the world and of the services they provide to human beings. For more info visit: www.millenniumassessment.org.
[12] (Chopara, Leemans, Kumar, & Simons, 2005, p. vii).
[13] (Macer, 2011, p. 5).
[14] (Chopara et al., 2005, p. vii).
[15] Article 2 of the Convention on Biological Diversity.
[16] (Primack & Carotenuto, 2003, p. 111).
[17] (Millennium Ecosystem Assessment, 2005, p. 2).

Development Goals[18] precisely in those regions that mostly need it[19]. Degraded ecosystems cannot provide the services needed to improve health, eradicate hunger, etc. On the contrary, «the sound management of ecosystem services provides cost-effective opportunities for addressing multiple development goals in synergic manner»[20]. The Millennium Ecosystem Assessment is clear: a drastic change is needed in the management and use of ecosystems and their biotic and abiotic elements. A shift towards sustainable practices is needed otherwise «degradation of ecosystem services could grow significantly worse during the first half of this century and represents a barrier to achieving the Millennium Development Goals»[21].

[18] The Millennium Development Goals are a set of eight targets that were agreed at the United Nations in 2010 (General Assembly Resolution A/RES/55/2) as part of a global partnership to reduce extreme poverty by 2015.
[19] (Millennium Ecosystem Assessment, 2005, p. 2).
[20] (Millennium Ecosystem Assessment, 2005, p. 2).
[21] (Chopara et al., 2005, p. 2).

Chapter 1.3. *Indigenous Peoples and Local Communities*

1.3.1. Critical Analysis of Definitions

The concept of biocultural rights refers to both indigenous peoples and local communities. Bavikatte and Robinson, the two authors that suggest the emergence of biocultural rights, gathered the two groups under the same umbrella of rights making no distinction between them. However, the border between the two terms is blurred, so I rather maintain them together but separate in order to be able to differentiate, when needed, between one and the other. In fact, while indigenous peoples can claim a range of internationally recognized rights, local communities have mostly not yet been recognized as rights-holders in international law[22]. Given the complexities hidden behind the use of such terms, it is important to briefly explore the current debate on their definitions.

Indigenous peoples

The problem of defining *indigenous peoples* is not only a matter of academic writing. The definition has implications because it is used by governments and Courts to decide which people are indigenous and which are not. Researchers must therefore be very careful when they propose precise definitions, as it may influence the attribution of rights to a certain people or another.

Most papers, books and reports regarding indigenous peoples affirm that there are more than 370 million people living in 90 different countries that can be included under the term indigenous peoples[23]. However, as Niezen[24] argues, this estimate is problematic not only because of the lack of regular and systematic national census of indigenous communities but also because of the yet unresolved difficulties concerning the definition of the term itself. Currently there is no universally recognized definition, but several different ones, overlapping only in parts. The most commonly cited definition is the one proposed by Martínez Cobo in the *Study of the Problem of Discrimination Against Indigenous Populations*[25], commissioned by the United Nations (UN) in 1986.

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[22] (Harry Jonas, Makagon, & Shrumm, 2012, p. 101).
[23] (United Nations, 2009).
[24] (Niezen, 2003, p. 224).
[25] Martínez Cobo was the Special Rapporteur of the Sub-Commission on Prevention of Discrimination and Protection of Minorities. The Study was the first extensive research commissioned by the UN on the indigenous issue and was adopted at the 52nd meeting of the UN Economic and Social Council, on 11 March 1986.

> «Indigenous communities, peoples and nations are those which, having a historical continuity with pre-invasion and pre-colonial societies that developed on their territories, consider themselves distinct from other sectors of the societies now prevailing in those territories, or parts of them. They form at present non-dominant sectors of society and are determined to preserve, develop and transmit to future generations their ancestral territories, and their ethnic identity, as the basis of their continued existence as peoples, in accordance with their own cultural patterns, social institutions and legal systems»[26].

Being the most cited it is also one of the most criticized definitions. Most critiques focus on its reference to pre-invasion and pre-colonial societies. The definition is accused to be under-inclusive, because it *a priori* excludes those peoples that live in territories that have not undergone colonialist invasions. It remains doubtful whether it also excludes those peoples that have been displaced and hence do not have anymore a connection to their original ancestral territories. The more recent (2009) definition proposed by James Anaya, the previous UN Special Rapporteur on the Rights of Indigenous Peoples, focuses on continuous connections with ancestral lands but it specifically includes those peoples struggling to regain access to such lands: «They are *indigenous* because their ancestral roots are embedded in the lands on which they live, or would like to live, much more deeply than the roots of more powerful sectors of society living in the same lands or in close proximity»[27].

At the other end of the issue of inclusiveness of the definition lies the fear of African and Asian States for an over-inclusiveness of the term. These States are frightened by the potential raise of an uncontrolled number of communities claiming indigenous status[28]. Their fear is not lacking foundations given that, during colonial times, the term *indigenous* was used to describe the whole native population as opposite to colonizers; it referred to the idea of "*who came first*". In this sense, while the term would be appropriate for the Americas and Oceania[29], it would not for Asia and Africa because all non-European-descendants Africans and Asians would be considered *indigenous*[30].

[26] (United Nations Commission on Human Rights, 1986, para. 279).
[27] (Anaya, 2009, p. 1).
[28] (African Commission on Human and Peoples' Rights, 2010).
[29] (Anaya, 2009, p. 137).
[30] (African Commission on Human and Peoples' Rights, 2003).

The Declaration on the Rights of Indigenous Peoples[31] (UNDRIP), adopted by the Unite Nations General Assembly in 2007, after more than 20 years of negotiations, fell short of shedding a clear light[32] on the definition of the term *indigenous peoples*[33]. The UNDRIP chose, as the UN Working Group on Indigenous Population[34], an "open door" policy[35]: alike the Working Group accepted submissions and interventions by groups *claiming* their indigenous status[36], the UNDRIP has chosen *self-identification* as the core criteria to qualify for *indigenous* status. Rather then providing a definition, UNDRIP revives a vicious circle of the Martínez Cobo Study[37]: «the right of indigenous peoples themselves to define what and who is indigenous»[38]. Nevertheless, the Declaration proposes, in different articles, some key characteristics of indigenous peoples: a history of common injustices as a result of colonization and land dispossession[39]; language, traditional practices, knowledge, and legal and cultural institutions distinct from those dominant in the national State where they reside[40]; and knowledge, culture and practices that contribute to the sustainable use and management of the environment[41]. The peculiar features of indigenous' cultures, institutions and traditions had already been central in the description of who indigenous peoples are in the 1989 International Labour Organization (ILO) Convention Number 169

[31] UNDRIP, unlike Martínez Cobo's definition, refers to indigenous *peoples,* rather than to communities or nations. The use of the term *peoples* in the UNDRIP has been a very important achievement because until then there was no international instrument recognizing them as *peoples* (Xanthaki, 2007, p. 133). Indigenous representatives have much insisted for the use of the term *peoples*, as a plural, because *peoples* are subjects of international law, and in particular are subjects whose right to self-determination is recognized by the UN Charter (art. 1.3) and by the two 1966 International Covenant on Civil and Political Rights and on Economic, Social and Cultural Rights (art. 1.1). Therefore «it symbolizes not just the basic human rights to which all individuals are entitled, but also land, territorial and collective rights, subsumed under the right to self-determination» (Posey, 1999a). This point will be discussed further in section 2.3.3. on the right to self-determination.
[32] (Errico, 2007).
[33] (African Commission on Human and Peoples' Rights, 2010).
[34] The Working Group on Indigenous Populations was established pursuant to resolution 1982/34 of the Economic and Social Council as a subsidiary organ of the Sub-Commission on the Promotion and Protection of Human Rights (an advisory body of the Commission on Human Rights). In 2006, when the Commission on Human Rights was replaced by the Human Rights Council, the functions of the Working Group were taken over by the UN Permanent Forum on Indigenous Issues, under the Economic and Social Council.
[35] (Niezen, 2003, p. 21).
[36] (Williams, 1990, cited in Anaya, 2009, p. 19).
[37] (Anaya, 2009, p. 28).
[38] (United Nations Commission on Human Rights, 1986, par. 369).
[39] UNDRIP, Preamble.
[40] UNDRIP, art. 5, 11, 12, 13, 20, 27, 31, and 34.
[41] UNDRIP, Preamble.

on Indigenous and Tribal Peoples' Rights[42]. Article 1 of ILO 169 defines indigenous peoples as:

> «tribal peoples in independent countries whose social, cultural and economic conditions distinguish them from other sections of the national community, and whose status is regulated wholly or partially by their own customs or traditions or by special laws or regulations».

Another recognized common characteristic of indigenous peoples is a past, and often present, of struggles against «State-sponsored genocide, forced settlement, relocation, political marginalization, and various formal attempts at cultural destruction»[43]. The struggle to exit disadvantaged conditions and the constant struggle against national States drives indigenous peoples close to ethnic minorities. The distinction is not completely accepted, and there still are States using *minority language* to refer to indigenous peoples[44]. Interestingly, although indigenous peoples are mostly isolated and small communities, Niezen draws a line between the two categories – minorities and indigenous – underlying the global width of the indigenous movement that acts in international *fora* as a single worldwide community rather than as many self-centred ones[45]. Another distinction that can be noted concerns the type of self-determination claimed. Indigenous peoples have mainly focused their claims on the *internal* right to self-determination while ethnic minorities more often claim for the recognition of the *external* right to self-determination[46]. Indigenous peoples have not used the term self-determination as a synonym for secession, and have interpreted it as a right to be exercised *within* the national state where they reside. It is presented in the UNDRIP as a prerequisite for their *right to be equal but different*[47]: the right to maintain cultural, religious and economic traditions and social institutions separate from those of the dominant part of the society[48].

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[42] From now on referred to as "ILO 169".
[43] (Niezen, 2003, p. 3). And also, as Anaya (2009, p. 1) notes, «indigenous peoples of today characteristically exist under conditions of severe disadvantage relative to others within the States constructed around them».
[44] (Xanthaki, 2007, p. 133).
[45] To describe this global movement Niezen has introduced the term *indigenism* as the expression of a global identity constructed upon a common history of suffering and marginalization and around the common struggle for a global change and the recognition of certain rights (Niezen, 2003).
[46] See below at 2.3.3.
[47] Art. 2 of the United Nations Declaration on the Rights of Indigenous Peoples.
[48] The problem of which peoples are indigenous also encompasses the problem of *who is indigenous* in individual terms. Should it be judged on the ground of tribe-membership, blood-quantum or behaviour? Different peoples and different countries have given very diverse

Drawing on the characteristic features used in the different definitions explored above, with the larger term *indigenous peoples* I will refer to those groups that can be said to present the following characteristics:

- Self-identification as indigenous peoples.
- Link to pre-colonial society;
- Strong link to a certain land and its natural resources;
- Cultural, legal, spiritual and economic traditions different from mainstream society;
- Determination to preserve, develop and transmit distinct traditions and lands;
- Past, and often present, of marginalization and oppression;

Local communities

The definition of the term *local communities* has not undergone an equally massive proliferation as *indigenous peoples*. Their first acknowledgment in international law is found in article 8j of the Convention on Biological Diversity (CBD)[49]. The CBD, echoing Principle 22 of the Rio Declaration[50], addresses «indigenous *and local communities* embodying traditional lifestyles relevant for the conservation of the environment»[51] (emphasis added) as holders of rights over their traditional knowledge associated with genetic resources. The language used underlines the importance of the link with biodiversity and lands, regardless of whether the interested subjects can be strictly qualified as indigenous peoples or simply as local communities. The term local community has since appeared in many other international documents issued by UN bodies, UN treaties and other international organisations, as for example, in resolutions of the Conference of the Parties and Guidelines of the Ramsar Convention on Wetlands, resolutions, policy documents and guidelines of the International Union for the Conservation of Nature (IUCN) and the World Wildlife Fund (WWF)[52]. In all of these documents, local

answers. Their analysis, even though very interesting, will not be dealt with in the present work. For further information, see (Brown, 2003).

[49] (Harry Jonas, Makagon, & Shrumm, 2013, p. 24).

[50] Principle 22: «Indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices. States should recognize and duly support their identity, culture and interests and enable their effective participation in the achievement of sustainable development». The Rio Declaration was adopted at the UN Conference on the Environment and Development, also known as the Earth Summit, in Rio de Janeiro in 1972.

[51] Art. 8j of the CBD.

[52] (Borrini-Feyerabend, Kothari, & Oviedo, 2004, p. 12).

communities are conceptualised as coming within the framework of consideration because of their relationship with the environment, whether this be lands, seeds, trees, animal, plants, rivers, deserts, wet and dry lands. Local communities do not come into play in the rights discourse simply because of their existence as communities, but precisely because of their role in the conservation of important natural resources. In 2011 the CBD Conference of the Parties convened an Ad-hoc Expert Meeting to identify the core characteristics of local communities[53]. The list that was agreed on is «broad and inclusive, and allow[s] for a clustering of unique cultural, ecological and social circumstances to each community»[54]. Many of the listed characteristics are very similar to those used to identify indigenous peoples: i.e. self-identification; strong link to traditional lands; set of cultural (including linguistic), legal, spiritual and economic traditions different from mainstream society; dynamic and evolving traditional practices and knowledge passed from generation to generation; past, and often present, of marginalization and oppression[55]. Besides these common characteristics, the CBD working group kept the focus on the importance of characteristics linked to environmental sustainability. The Working Group suggests that in order to classify as *local community*, a community needs to have «lifestyles linked to traditions associated with natural cycles», to have a «sustainable use of nature and biodiversity» and to hold «technology/knowledge/innovations/practices associated with the sustainable use and conservation of biological diversity», «spiritual and cultural values of biodiversity and territories», and «foods and food preparation systems and traditional medicines [...] closely connected to biodiversity/environment»[56].

The Inter-American Court on Human Rights has recently issued two very attention-grabbing judgments. In the two cases, the Court treated local communities composed of descendants of African slaves as holders of the same rights recognized to indigenous peoples[57]. Specifically, in the 2005 Moiwana Village v. Suriname[58] case, the Court recognized the Moiwana community members, that settled in late 19th century[59], as the legitimate owners of their ancestral territory[60] regardless of the lack of legal title, following the same rationale used for the case

[53] (*UNEP/CBD/WG8J/7/8/Add.1*, 2011).
[54] (Harry Jonas et al., 2013, p. 25).
[55] Extract from (*UNEP/CBD/WG8J/7/8/Add.1*, 2011, pp. 12–13).
[56] (*UNEP/CBD/WG8J/7/8/Add.1*, 2011, pp. 12–13)
[57] (Antkowiak, 2007).
[58] Moiwana Village v. Suriname, Inter-Am. C.H.R., No 124, Ser. C (2005).
[59] Moiwana Village v. Suriname, par. 132.
[60] Moiwana Village v. Suriname, par. 128.

Mayagna (Sumo) Awas Tingni Community v. Nicaragua[61], that dealt with indigenous peoples. Referring to the ex-slave community, the Court «held that, in the case of indigenous communities who have occupied their ancestral lands in accordance with customary practices – yet who lack real title to the property – mere possession of the land should suffice to obtain official recognition of their communal ownership»[62]. Again, in the 2007 Saramaka People v. Suriname[63] case, the Court recalled the previous case and recognized to the Saramaka people, also descendants of black slaves, the collective ownership of their ancestral land applying its precedents regarding indigenous peoples[64]. In the two decisions the Court recognizes specific rights to ancestral lands to those communities that «regulate themselves [...] by their own norms, customs and/or traditions [...][and whose] social, cultural and economic characteristics are different from other sections of the national community»[65], regardless of the fact that they cannot be classified as *indigenous* to those lands.

Notwithstanding all of these documents that attempt to identify local communities, the question *what are local communities* remains a complex and nuanced one. The CBD and the other related documents expect a community to be sustainable in order to classify as a *local community*. In fact, while the central characteristic that indigenous peoples need to have in order to qualify as holders of indigenous rights is to descend from pre-colonial and pre-invasion societies, local communities most often need to be environmentally sustainable to qualify as holders of certain local communities' rights. In the words of Jonas *et al*.:

> «[...] once a person identifies him or herself as Indigenous, they can exercise certain rights under international law regardless of the type of lifestyle they lead. Indigenous peoples do not have to show that they are conserving and sustainably using biodiversity as a prerequisite for being able to claim indigenous peoples' rights. In contrast, the rights of "local communities" are generally dependent, as in CBD Article 8(j), on whether their lifestyles are "relevant for the conservation and sustainable use of biological diversity"». [66]

The texts quoted above blur the distinction between definition of *local communities* and requirements to be *holders of certain rights*. For the purpose of

[61] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, Inter-Am. C.H.R., No.79, Ser. C (2001).
[62] Moiwana Village v. Suriname, par 131.
[63] Saramaka People v. Suriname, Iner-Am. C.H.R., No. 172, Ser.C (2007).
[64] Saramaka People v. Suriname, par. 86.
[65] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, par 84.
[66] (Harry Jonas et al., 2013, p. 26).

this work, it is considered more appropriate to distinguish between the two concepts: i.e. between the definition of local communities and the characteristics they need to have to hold local communities' rights. The definition of local communities here used, hence, does not need to include environmental sustainability and can focus simply of socio-cultural characteristics: *small groups of people that identify themselves as a community, that live at low population densities and regulate themselves by their own norms and traditions, and that have a long-standing social and cultural organization that binds them together to a defined land and its natural resources and that distinguish them from other, more affirmed and less marginalized, sectors of the national society*.

Conclusions

For both terms, *indigenous peoples* and *local communities*, there will be particular cases of groups inappropriately falling within or outside their scope. For the purpose of this work the two terms *indigenous peoples* and *local communities* (IPLCs) will often be used together and, when needed, due differences will be underlined.

Nevertheless, in the biocultural rights discourse, IPLCs come into play for their role as 'conservationists' of local ecosystems and the element for the identification of the holders of biocultural rights is not the identification of a group as an indigenous people or a local community. It is rather the existence of a special connection with the environment. Posey has encountered a similar problem in his work on Traditional Resources Rights[67] and has decided to stress the importance of such special connection with the environment as the main feature to identify the subjects holders of rights.

> «The debate over who is indigenous should not side-track the important task of valuing local communities [...] and to rekindle and enhance the spiritual and cultural values that cultures have used effectively to conserve biodiversity»[68].

Such focus may lead to expand the discourse, as Michelle Cocks suggests[69], to include in the discourse about biocultural diversity (that concerns the mutually beneficial interaction between cultural and biological diversity), also less "exotic"[70] communities that have migrated to peri-urban or urban areas and that

[67] See below at 4.1.5.
[68] (Posey, 1999a).
[69] (Cocks, 2006).
[70] (Cocks, 2006, p. 190).

have maintained a «nature-related sense of cultural identity»[71]. She argues that a community does not need to «live geographically close to natural environment for it to hold spiritual, social, and cultural value»[72] and that the theory on biocultural diversity should extend to include also more varied social groups[73]. While it is true that for the discourse on biocultural diversity (the focus of her article) that seeks to show the heterogeneous relationships between human culture and nature it would be appropriate to expand the scope of research to such urban and peri-urban communities, it would not be appropriate to expand the discourse about biocultural rights to such communities. In fact, biocultural rights concern the management and conservation of lands and territories that are still considered very rich in biodiversity. Biocultural rights, in their current formulation, concern those territories that could for example qualify for the inclusion in protected areas and that are particularly important for the survival of certain habitats or species. Those communities that live in urban or peri-urban areas may be holders of very important traditional ecological knowledge concerning medicinal and other uses of plants and animals parts, and may attach spiritual or religious values to such practices and species. However, such communities do not fall within the realm of biocultural rights because they do not manage, nor actively seek to manage, whole lands and ecosystems in sustainable ways.

[71] (Cocks, 2006, p. 191 and 195).
[72] (Cocks, 2006, p. 194).
[73] (Cocks, 2006, p. 195).

Part 2. Rights: Instruments and Theories

Chapter 2.1. *The Structure of Rights*

Since we are attempting to analyse the content and implications of a new concept within human rights discourse, we first need to convey on and lay out an understanding of the structure of rights and of the meaning of their constitutive elements. For this purpose the present work with draw on the framework of legal relations and correlations proposed by Wesley N. Hohfeld[74], briefly laid out[75] in the following section. Hohfeld's theory is here used as a set of practical tools and is not fully embraced. When needed, distance will be taken from Hohfeld's positions and concepts and theories more suitable for the purpose of this work will be employed.

2.1.1. Hohfeld Theory

Hohfeld drew a framework of the legal concepts that he saw implied in the broader and ambiguous concept of *rights*, a term that he thought too often used inappropriately and confusedly in legal discourse to refer to very different concepts[76]. He distilled a set of four legal positions that he sees as composing the concept of rights and that are logically, and necessarily, correlated to four other legal positions. Here follows a brief reconstruction of his work slightly adapted to the needs of this thesis (for example, Hohfeld makes no reference to rights of groups of people).

Claim-right[77] **-** ***Hohfeldian*** **Duty**[78]

P has a claim-right against Q if Q has the duty to do X for P. Where P is a person or a group, X is the content of the right and Q is a person, or a group, that holds the corresponding duty.

In Hohfeld's structure, the right-holder may also be the person entitled to *claim* for the enforcement of her right but it may also not be so[79].

[74] (Hohfeld, 1919).
[75] The introduction to Hohfeld framework is drawn mostly form Celano (2001), Kramer (1998b) and Waldron (1984), that draw on Hohfeld (1919).
[76] (Celano, 2001, p. 8; Simmonds, 2008, p. 296).
[77] Hohfeld uses interchangeably the term *claim* and the term *right*. I will use the term Hohfeldian *claim*.
[78] I will always refer to *duty* as understood by Hohfeld using the expression "Hohfeldian duty".
[79] (Matthew H Kramer, 1998b, p. 9).

Liberty - No-right

P has a liberty against Q in relation to X, if P has no duty towards Q to do X. Q may be another person or a group of people. Unless it is connected with a Hohfeldian duty on Q, P can find interference in doing or not doing X by those same people that have no-right towards her in relation to X. So, following an example by Kramer[80], P may have the liberty, against Q, to express her political opinions. So Q has no right to P's not expressing her political opinion. However, P's liberty does not comprehend Q's duty to refrain from actions that may negatively interfere with P's liberty, such as for example making a lot or noise to cover P's voice.

Power - Liability

P has a power towards Q if P can change Q's legal positions. So when Q is in a position of liability towards P, Q is subject to the will of P for what concerns a certain legal position.

For example, if Q is a debtor to P, P may have the power to clear out the debt, and therefore change the position of duty of Q. In this case P was in a position of liability towards herself too, because she can change her position of right-holder towards Q.

Immunity - Disability

P has an immunity towards Q (or toward himself) if Q has no power, so is unable, to modify a legal position of P. Fundamental rights are often defined as inalienable and inviolable rights, meaning that no one, not even the State or the right-holder himself, can withdraw them. In Hohfeldian terms, the holder of such rights is in a position of immunity in regards to his fundamental rights.

The first four legal positions (claim-right, liberty, power and immunity) describe positive legal positions of their holders and are to be understood, in Hohfeld theory, as rights against specific persons, «thus, each Hohfeldian right resolves one issue only, as between two parties only»[81].

The first two correlated legal positions are, in Hohfeld scheme, first-order relations that have direct consequences on people's behaviour. The two following couples are second-order relations that have a direct influence on entitlements (such as property and debts) but not on people's behaviour[82].

[80] (Matthew H Kramer, 1998b, p. 11).
[81] (Simmonds, 2008, p. 297).
[82] (Matthew H Kramer, 1998b, p. 20).

All the above-mentioned legal positions necessarily imply their corresponding positions, as none can exist without the other. From each legal position stems the corresponding legal position on a certain person or group. Therefore, if in a legal system there is a norm recognizing one of such legal positions, the corresponding legal position exists, even in the absence of a norm explicitly recognizing it[83]. This way of perceiving the correlation between legal positions is called *static* vision of rights. For the supporters of this vision, rights are determined Hohfeldian positions, or, most frequently, clusters of them[84]. Single positions can be micro-rights, but as such they may have very little use to their holders[85]. In fact, most rights are compositions of Hohfeldian positions. As seen above, P's *liberty* to express her political opinions may become very little thing if not correlated with other positions, as for example: the *right* to physical integrity, whose correlated *Hohfeldian duty* on fellow citizens and on the State obliges them not to harm P while she is expressing her political opinion; the *immunity* towards the State's decision to change the law and wipe P's liberty away; the *right* to meet with other people to talk, and the corresponding *duty* of the State not to arrest gathering people. Another example, the right of property, is provided by Simmonds: «an owner of a land [...] typically enjoys (*inter alia*) the claim-right that others should not trespass on his land, the liberty to walk upon his land, the power to transfer title to others, and an immunity against having his title altered or transferred by the act of another»[86].

[83] (Pino, 2013, pp. 230–231).
[84] (Pino, 2013, p. 236).
[85] (Pino, 2013, p. 236).
[86] (Simmonds, 2008, p. 296, note 14).

Chapter 2.2. *Theories of Rights*

Hohfeld framework is a description of what rights may be composed of, but it makes no reference to the content that rights should or should not have and to what justifies their being recognized as such. In contemporary jurisprudence, two main theories have been developed in the attempt to answer to the broad question of the justification of rights: the Will (or Choice) Theory and the Interest (or Benefit) Theory.

2.2.1. Will (Choice) Theory

The underpinning of the Will Theory of rights is the importance of individual choices. In Herbert L.A. Hart's version of the theory, that he developed in mid 1900, «a legal right is a legally respected choice»[87], meaning that the law creates a sphere where the right-holder can freely and autonomously choose about another person' duty[88]. Each right can be composed of one or many Hohfeldian positions (claim, liberty, power, immunity) and by their corresponding positions (Hohfeldian duty, no-right, liability, disability). Holding a right is like having an opportunity[89]: the right-holder can decide whether or not the duty-bearer shall perform the duty, so being a «small-scale sovereign to whom the duty is owed»[90].

The Will Theory supports, like Hohfeld's framework, a *static* vision of rights. To each right there is a determined corresponding duty, or a number of corresponding duties, imposed on a determined person or group of people. If the duty ceases to exist then the right does as well. The power of the right-holder to claim the enforcement or the waive of the duty, and his choice over it, is exactly the value that, for the Will Theory is to be protected. The ability to enforce or waive someone's duty is the origin, the point, the justification of each right. So for example, if P has the right to have brought coffee every morning by Q, the protection granted from the recognition of the right is over the ability of P to require coffee from Q and to dismiss her from her duty (for one morning or for all of them). The existence of one single justification for all rights makes the Will Theory a monist theory of rights, in opposition to the Interest Theory, that will be sketched out in next section.

[87] (Hart, 1973, pp.188-189, cited in Celano, 2001, p. 20).
[88] (Pino, 2013, p. 241).
[89] (Matthew H Kramer, 1998a, p. 2).
[90] (Hart, 1973, pp. 183-184, cited in Celano, 2001, p. 21).

Many different versions of the Choice Theory have been developed, and they all build on the following principles:

- for X to be a right-holder it is necessary and sufficient that she can demand or waive the enforcement of the right[91]. So the claimant and the right-holder necessarily overlap;

- rights do not necessarily, nor sufficiently, protect an interest or the wellbeing of the right-holder[92], other than her power to exercise control over the corresponding duty[93]. So X, the right-holder, may or may not benefit from the realization of the duty.

Its focus on choice-making makes the theory ill suited to accept as rights-holders all those subjects that cannot, legally or empirically, make decisions on their own. Therefore, children, mentally ill and animals cannot be conceived as right-bearers because they cannot decide on the waiving or enforcing of a duty. Truth is that the classification of animals as rights-holders is very controversial, but it is even more controversial to affirm that children and mentally ill people have no rights. This issue has not gone silent in the writings of adherents to the Will Theory. Many have replied to this criticism affirming that it is sufficient that some other person is entitled, on children's behalf, to enforce or waive their rights[94]. However, it disregards the fact that those entitled to act on the child's behalf are most likely the bearer of most duties against her (parents or guardians), which creates quite a strong clash of interests. Moreover many rights are today considered (morally and in many countries legally) un-disposable by anyone at all. And here comes along another shortcoming of the Will Theory. It cannot account for the existence of certain rights that are considered so important and vital that their holder cannot dispose of them, and cannot exercise this sovereign power on the duty bearer. In modern constitutional democracies, for example, there are sets of rights, as the right to freedom of expression and to freedom of religion, that are considered un-disposable neither by the State nor by their holders. These rights are what is usually called fundamental or human rights: rights that defend interests of human beings so important that they cannot be disposed of by the State nor by their holders. For the Will Theory, once a right is secured as un-disposable, it ceases to

[91] (Matthew H Kramer, 1998b, p. 62).
[92] (Matthew H Kramer, 1998a, p. 2).
[93] (Celano, 2001, p. 27).
[94] (MacCormick, 1976, p. 77).

be a right, leading to the paradox, in Kramer's words, that: «rights are no longer rights when they protect crucial interests unyieldingly»[95].

2.2.2. Interest (Benefit) Theory

The Interest Theory, considered the main opponent to the Will/Choice Theory, has been developed initially by J. Bentham and then built up by many other authors (among which David Lyons, Joseph Raz, Neil MacCormick, Matthew Kramer).

The Interest Theory grows around the importance attributed to the interests of the right-holder. Rights are understood as means of protection of certain interests of their holders and are justified by the existence of an interest that is considered worth of protection[96]. So for MacCormick: «having rights is having one's interest protected in certain ways by the imposition of (legal or moral) normative constraints on the acts and activities of other people with respect to the object of one's interest»[97]. Raz defines rights as «legally protected interests»[98] and writes that «X has a right if and only if X can have rights, and, other things being equal, an aspect of X's well-being (his interest) is a sufficient reason for holding some other person(s) to be under a duty»[99]. Who can be holders of rights? Which Xs "can have rights"? Raz argues that «an individual is capable of having rights if and only if either his wellbeing is of ultimate value»[100]. That X's wellbeing is of ultimate value means that X's interests have an intrinsic value detached from their potential instrumental values[101]. This view, Raz underlines, «does not commit one to individualism»[102] because also «States, corporations and groups»[103] as well as «the public»[104] «may be rights-holders»[105].

For the Interest Theory, there is no need for the right-holder to be able to require the enforcing or waiving of the duty stemming from her right. Hence, the Interest Theory is able to embrace the idea of children and mentally ill people as rights-holders, because the ability to waive or demand the enforcement of a duty is not a requisite. It can also account for the idea of unyielding rights, once more because there is no need for a right-holder to be able to give away her right.

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[95] (Matthew H Kramer, 1998b, p. 74).
[96] (Pino, 2013, p. 241).
[97] (MacCormick, 1976, p. 75).
[98] (Raz, 1984, p. 12).
[99] (Raz, 1988, p. 166).
[100] (Raz, 1988, p. 166).
[101] (Raz, 1988, p. 177).
[102] (Raz, 1988, p. 180).
[103] (Raz, 1988, p. 180). More on group rights at 2.3.3.
[104] (Raz, 1988, p. 179).
[105] (Raz, 1988, p. 180).

How do we distinguish in the Interest Theory a pure beneficiary of a duty, from a proper right holder? The right-holder is the subject whose interest *justifies* the existence of the corresponding duty. Her interest is considered sufficiently important to cause the raise of a duty on someone else. The fulfilment of the duty may also benefit other subjects, but the fact that they benefit from the fulfilment of the duty does not justify the existence of the right (and consequently of the duty). If the interest of the right-holder ceases to be, the whole right ceases to be, and so all the corresponding duties and the benefits stemming from its existence[106]. So, for MacCormick, a right arises when a certain treatment or good is so important for the needs, interests or desires of the members of a certain group that it shall be secured to them and it would be legally and/or morally wrong to deny that good or treatment[107], regardless of the advantages or disadvantaged to someone else[108]. The interests of the members of the group are the reason for the creation of the duty. The duty shall not arise from some other end, the instrumental value above mentioned, and then, accidentally, promote the interest of the group. MacCormick's example with children and turkeys makes things very clear. We can say that there is a duty on a farmer to feed both his sons and turkeys: turkeys are to be fed to get fat and be eaten for Christmas, while kids are to be fed because it is a very important interest they have. The feeding occurs for the turkeys because their wellbeing is a means to an end – the Christmas lunch – while it occurs for the children because their wellbeing is an end in itself[109] (unless maybe we are talking about Hansel and Gretel being fed by a witch).

So in the Interest Theory the point, the justification for the existence of a right is not the protection of individual choices, but the protection of a specific range of interests (range that may change in each different legal system, culture or moral conception). The Interest Theory is in fact a pluralist theory, meaning that rights can be justified on the ground of different interests and values[110]. The central idea of the Will Theory can be embraced by the Interest Theory by recognizing that, among the interests of the right-holder, there can also lay the interest of making a free and autonomous choice on the waiving or enforcing of the corresponding duty

[106] Bentham proposes a different rule to distinguish simple beneficiaries from real right-holders. He proposes to look at the effects of the lack of compliance of the duty-bearer, Q, toward P. If we can establish that the Q has not undertaken her obligation simply by looking at P's detriment, then, for Bentham, P is to be considered a right-holder (Matthew H Kramer, 1998b, p. 81).
[107] (Celano, 2001, pp. 37–38).
[108] (MacCormick, 1976, p. 80).
[109] (MacCormick, 1976, p. 80).
[110] (Celano, 2001, p. 41).

(hybridization of the two theories of rights)[111]. To go back to the right of P to have brought coffee every morning by Q, the justification may be found in different interests of P. It may be the interest of P to have Q doing something for her every morning, or it may be the interest of P to have coffee every morning, or it can be the interest of P to require the enforcement or to dismiss the duty of Q. Depending on the protected interest, the right may react differently to the change of circumstances, something that may not happen in the Will Theory. As we saw, in the Will Theory, protection is granted on, and only on, the specific duty of Q towards P. If there is no Q, there is no right of P that can be fulfilled. In the Interest Theory instead, if for example, the protected interest is for P to have coffee every morning, if Q is away, P's right could be fulfilled by Z bringing coffee every morning or even by P being donated a coffee maker for her office.

For many authors, among which Raz[112] and MacCormick[113], P can be said to hold a right even if there is no specified duty-bearer yet, as long as some interest of P is recognized worth of determining duties and obligations on others (whether they are enforceable or not)[114]. For other authors instead, as for Bentham, P can be said to hold a right if, and only if, Q, the holder of the duty, has already been specified[115].

Kramer distilled what he considers the essential elements of the Interest theory, common to all its different versions.

- For P to hold a right, it is necessary but not sufficient that the right preserves one or more interests of P[116]. So every right-holder is a beneficiary of a duty, yet, not all beneficiaries are right-holders[117].

- The duty due to P has to be "generally supportive"[118] of P's interests in order for P to be considered a right-holder and not simply the subject of someone else's duty. So the duty shall benefit the right-holder, increasing her (material, spiritual) wellbeing. Of course this assumption requires an evaluative analysis of what is good and what is bad for a person. For this reason, Kramer uses the expression "generally" supportive and not "always" supportive. Some people may, in fact, perceive one of their legal rights as

[111] (Pino, 2013, p. 242).
[112] (Nino, 1992, p. XV).
[113] (MacCormick, 1976, p. 82).
[114] (Waldron, 1984, p. 10).
[115] (Waldron, 1984, p. 9).
[116] (Matthew H Kramer, 1998b, p. 62).
[117] (Matthew H Kramer, 1998b, p. 67).
[118] (Matthew H Kramer, 1998a, p. 92).

detrimental to their interests. Or it may also be the case that, in a particular situation, a right may actually have negative consequences for the right-holder[119]. So, rights are "normally" advantageous, but they may not always be so[120].

- For P to be a right-holder it is not necessary that P can demand or waive the enforcement of the right[121]. So a right-holder may or may not also be a claim-holder.

2.2.1. Analysis of Rights

The Theory of Rights that is going to be adopted in the present work is the Interest Theory of rights, both because it seems to be for the moment the mostly accepted one, and because it seems the most appropriate to analyse the theoretical construct of biocultural rights. Biocultrual rights, in fact, are built around the aim to protect two different interests which are the justifications of biocultural rights. This analysis will be hybridized with Hohfeld theory. Hohfeldian legal positions will be used as the bricks inside rights. Rights will be considered justifications for the existence of clusters of Hohfeldian positions whose content may change depending on the situation, rather than as static pre-sets of legal positions necessary linked to their correlatives[122].

Pino describes rights as having a triad structure composed by: the subjects who hold the right, the subjects that hold the corresponding legal position (may it be a duty, a lack-of-right, an immunity or a disability) and the content of the right[123]. For the purpose of the present analysis, two more elements are taken in consideration: the claimants and the protected interest(s). Each of these elements will be briefly described, and then biocultural rights will be analysed using these elements and the difficulties and controversies of this process will be observed.

Protected interests

The protected interests are the values that underpin each right. They are the justification it stems from, they are their *raison d'être*. The right, with its cluster

[119] (Matthew H Kramer, 1998b, p. 97).
[120] (Matthew H Kramer, 1998b, p. 93).
[121] (Matthew H Kramer, 1998b, p. 62).
[122] As Simmonds writes explaining Raz's and MacCormick's positions concerning Hohfeld theory: « [...] a right is a weighty interests which may be protected, in appropriate circumstances, by an array of Hohfeldian claim-rights, liberties, powers and immunities: in effect, Hohfeld confuses "rights" with specific devices whereby they are protected» (Simmonds, 2008, pp. 305–306).
[123] (Pino, 2013, p. 229).

of Hohfeldian positions, exists to protect the interest of a person, a group of people, a minority, the whole human population, future generations, and for some scholars, animal, plants, or the planet.

It is also important to notice that the interests might, and most often do, conflict with the interests protected by other rights[124].

Right-holders

The right holder is the person, or group of people, to whom the right is recognized. She is the holder of the interests that are protected by the right. She may or may not be also the claimant and may or may not be the sole beneficiary of the realization of the right.

Claimants

The claimants are those empowered to require the enforcing or the waiving of a right. They may also be right-holders, but for the Interest Theory they do not need to.

Duty-bearers

The duty-bearer is the person, or group of people, who shall or shall not perform an act or provide/not provide a good for the benefit of the right-holder. The duty-bearer of a right might or might not be already specified.

Content of the right

The content of the right is the set of actions that the duty-bearer shall or shall not perform, and/or a good and/or a way things ought to be. The content of a right has to be something normally beneficial for the right-holder, though in some cases it might happen that the content of the right harms the interests of the right-holder.

[124] (Pino, 2013, p. 242). See below at 2.3.2.

Chapter 2.3. *A Special Type of Rights: Human Rights*

2.3.1. What are Human Rights?

Certain rights are considered to have a particular status, to be special and somehow more powerful than others. This is the status commonly recognized to "human rights" or "fundamental rights". Literature on human rights is wide and heterogeneous, as there still seems to be little agreement on their definition, content and, in some cases, on their very existence.

In order to provide a brief account of human rights, it is wise to walk back to their origins. The idea of human rights emerged, in the form we know today, between the XVII and XVIII centuries within the European struggles against the privileges of the *ancien régime*. They were used as rhetorical arguments based upon three "new" ideas: 1) the idea that all human beings, because they are human beings, are holders of certain rights; 2) the idea that such rights are fundamentally important; 3) and the idea that the holder of such fundamentally important rights is himself the reason for the existence of the State. Looking more in detail at these three ideas, it is possible to gain a deeper understanding of the notion of human rights as we know it today, and it may help us examine the concept of biocultural rights.

1) Human rights are rights «that we have simply in virtue of being human»[125], and not because of other characteristics one might have - race, citizenship, gender, class, etc. All such characteristics are considered accidental and irrelevant for the recognition of human rights. This plea stems from the XVII centuries Natural Law philosophers and lies at the core of the French and American revolutions. Natural characteristics, such as talent, beauty and skills, are considered irrelevant for the attribution of human rights: all human beings equally hold such rights, in the same way and to the same degree[126]. This brings out two of the main characteristics of human rights: their being universal (applicable to everyone) and egalitarian (the same for everyone).

2) Certain rights are fundamentally important. Following what John Tasioulas calls the *orthodox* conception of human rights[127], human rights are moral rights held by all human beings that concern interests and goods, essential to protect the core of being human. For James Griffin human rights are protections of human standing,

[125] (Griffin, 2008, p. 2).
[126] (Celano, 2007).
[127] (Tasioulas, 2010, p. 114).

of personhood[128]. For Alan Gewirth human rights are the necessary conditions for human agency, the central characteristic of being human[129]: agents need them to pursue their purposes[130]. Precisely because they protect very important interests, they need a special protection. They do not appear as normal rights, but as specially secured ones which, as such, are: *inviolable*, their violation is never justified; *inalienable*, they cannot be waived nor transferred to others, not even with the consent of the holder; *imprescriptible*, they do not cease to be even if their holder does not exercise them or is not aware of them[131].

Following the *political* conception[132] instead, human rights are not moral entities, but political entities. They are rights that «set the limits to the sovereignty of States»[133] and are a sufficient reason to act against violations in the international arena, even at the cost of the sovereignty of States. This conception rests on the assumptions that human rights lack a foundation in a moral concern and do not belong to people solely in virtue of their being human[134]. Human rights are seen as dependent on the contingencies of national and international systems[135] and as deriving from relationships between people as participants in global politics[136]. They are understood as standards to be respected and to be used to judge

[128] (Griffin, 2001, p. 311). Personhood, or agency, is understood as the ability to deliberate, assess, choose, and act to do what one sees as a good life for oneself. In order to protect personhood, Griffin identifies four needs, from which he then derives all other important human rights: not to be controlled or dominated by someone else in the choice of one's own course of life (autonomy); to have a minimum of education and information; to have a minimum material provision of resources; not to be stopped by others when pursing what one sees as a good life (liberty) (Griffin, 2001, p. 311). Most of the commonly recognized human rights in constitutional democracies, such as the right to life, to security of the person, to freedom of expression, to assembly, to worship, to a minimum standard of material resources and learning, fall within the realm of one of the needs of personhood, and therefore classify as human rights for Griffin (Griffin, 2001, p. 311). But, Griffin underlines, since human rights are a special protection, they shall include only very important assets, not whims and wishes (Griffin, 2001, p. 320). They protect only what is needed for *human status* (Griffin, 2001, p. 312) and not for human *happiness* or *flourishing* (though he accepts the protection of the right to the *pursuit of one's happiness*) (Griffin, 2001, p. 312). Less personhood-centred claims and liberties (in Hohfeldian terms) remain at the degree of normal rights.
[129] (Raz, 2010, p. 3).
[130] (Gewirth, 1979, p. 1152). For Gerwirth, these conditions are freedom and well-being. Freedom is defined as the possibility to control «one's behavior by one's unforced choice while having knowledge of relevant circumstances, and well-being consists in having the other substantive general abilities and conditions required for agency» (Gewirth, 1979, p. 1149).
[131] (Celano, 2007).
[132] (Tasioulas, 2010, p. 120 ff.).
[133] (Raz, 2010, p. 328).
[134] (Beitz, 2003, p. 43)
[135] (Raz, 2010, p. 336).
[136] (Beitz, 2003, p. 43).

institutions of modern societies[137]. This conception links us to the next idea, concerning the relationship between human rights and States.

3) Human rights are the justification for the existence of the State, or other governing bodies, and are, as such, the criteria to evaluate its legitimacy[138]. This idea was clearly professed by the French *Déclaration des droits de l'homme et du citoyen*, 1789, that stated that «the purpose of all political association is the preservation of the natural and imprescriptible rights of man», and by the American Declaration of Independence, 1776, where governments are said to be established to ensure to all people the inalienable rights conferred by the Creator. Soon after the revolutions this idea was pushed aside, at least in Europe, by the success of the *Rechtsstaat*, that placed the legitimacy and source of the law in the State itself. Human rights became subject to the will of the State, existing only if recognized by it. The Law and the State gained priority over rights and individuals. After the end of World War II, the model of the *Rechtsstaat* was abandoned in favour of a new model, that found legitimation and reason for being precisely in the protection of human rights: the Constitutional State. In their new raise, human rights become *trumps*[139] against the power of State: they are individual claims *vis à vis* States, used to protect individuals against the excesses and degenerations of the power of the State. And they become the justification of the very existence of the State. This change in the role of human rights *vis à vis* States is what Noberto Bobbio, in his article *Il primato dei diritti sui doveri*, refers to as a *Copernican Revolution*[140]. Recalling Kant's use of the term, Bobbio describes it as the inversion of the point of observation, from the perspective of duties to the perspective of rights[141]. He recognizes an intrinsic correlation between rights and duties but, he argues, there is always one of the two that is prevailing over the other: as a father over a son, or the head over the tail of a coin. Up until the above-mentioned Revolutions, and again during the ruling of the *Rechtsstaat*, the history of human politics has been characterized by the prevalence of duties over rights[142]. «At the beginning», he writes, «there is always a code of duties (or obligations), *not of rights*»[143]. Laws established what shall be done and what shall not be done for the sake of the State, of the community. Duties and obligations were not imposed for the benefit of individuals, to guarantee the

[137] (Beitz, 2003, p. 44).
[138] (Beitz, 2003, p. 39).
[139] The idea of rights as trumps was developed by R. Dworkin (1977).
[140] (Bobbio, 1988, p. 432).
[141] (Bobbio, 1988, p. 432).
[142] (Bobbio, 1988, p. 432).
[143] (Bobbio, 1988, p. 432). My translation.

respect of their interests, but instead to safeguard the whole of society. In this *holistic* perspective, society is a unit whose conservation and wellbeing comes before the interest of individuals. Bobbio brings the example of laws against murders, aimed at protecting the integrity and the peace of the group rather than the lives of human beings – which is why such laws often did not forbid the killing of outsiders[144].

Bobbio's *Copernican Revolution* is completed with the advent of Constitutional Democracies, where the holistic perspective is replaced by an *individualistic* perception of society. Here the single human being has a value in itself that must be preserved through the respect of her human rights. The State changes its role: from guardian of society as a whole, it becomes, at least in theory, guardian of the individual and his human rights. Duties hence turn into the tail of the coin, and serve as tools for the realization of rights, the head.

Similarly, Lombardi Vallauri describes a transition from man as a subject of the Law to man as the *raison d'être* of the Law that culminates with Constitutional Democracies. Luigi Lombardi Vallauri sets this transition at the end of the Middle Age and the beginning of what he calls modern technological scientism (or materialism)[145]: the ideology of dominance of man over the world, natural, psychological and social. While the ancient man found himself in front of an unchangeable world that originated from something superior to humans, modern man, thanks to the power of science and technology, perceives the world and nature as something that can be modified as he pleases. Under the ancient vision, just like nature and the world are unchangeable products of a superior being, Law is as well. Law is revelation, a manifestation of divine wisdom. Law is natural. And, as all revelations, it is incontestable and un-modifiable. In the hands of kings and Emperors, Law sets duties and obligations on individuals, which shall be respected for the sake of the State and of the society. With the coming of modern age, and of technological scientism, Lombardi Vallauri describes a man that begins to consider himself powerful over nature and independent from divinity. Law ceases to be a revelation, stemming from someone superior to man. It becomes the product of human authority and its will, and as such it can be contested and modified. Men, unlike nature-divinity, can be wrong, and can become oppressive trough unreasonable uses of Law. Hence it comes the need to find ways to limit human authority and its rule. Such limits are found, for Lombardi Vallauri, in Constitutional Democracies, whose central principle is the limitation of sovereign

[144] (Bobbio, 1988, p. 433).
[145] (Lombardi Vallauri, 1981, p. 263).

power[146] trough the imposition of instruments aimed at protecting human rights. Human rights, as remedies against humans' error, were not needed until the power and the law were perceived as being in the hands of nature-divinity. They come into being when the sovereign power is not anymore bound to the respect of the divine will and men need to be protected from the excesses of other men's power.

2.3.2. Some Issues Concerning Human Rights

From the merging of these ideas, human rights emerge as rights that protect particularly important human interests. So important to be recognized equally to all human beings because they protect the specific features of each human subject, regardless of his or her ethnicity, citizenship, gender, age, class, social status, physical and mental condition, etc. They are so important to be considered inviolable, inalienable and imprescriptible. And so important that no State or other governing body may be considered legitimate if persistently violating them or allowing their violation; so important to be the *raison d'être* of the State – in particular of Constitutional Democracies –, and to trump over political and economic considerations. In Dworkin elaboration, human rights are cards, trumps, which win over considerations of general interests[147]. Rights protect human interest considered so fundamental to be entitled to change the course of political decisions. Those individual interests trump over the interest of the community as a whole[148] and lead to decisions different from those that collective goals would have led to[149].

Conflicting human rights

Are human rights really *inviolable*? Is their violation never justified? *Prima facie*, after our brief account of their relevance for human beings one may think it obvious to argue that they should be treated, always, as inviolable. Nevertheless, we must be able to face a situation of conflict not only between human rights and policies, or other kinds of interests, but also between human rights themselves. Which means that the interests justifying two or more rights cannot be protected simultaneously or/and that the duties implied by two or more rights cannot be performed simultaneously[150].

[146] (Lombardi Vallauri, 1981, p. 238).
[147] (Waldron, 1984, p. 17).
[148] (Dworkin, 1984, p. 153).
[149] (Waldron, 1984, p. 17).
[150] (Celano, 2013, p. 137).

What to do when rights conflict? The most diffuse *technique* to face such conflicts, widely used in constitutional argumentations, is *balancing*[151]. It is a process of weighting rights against each other in order to decide which should prevail over the other and to what extent each shall be restricted. Two main objections have been raised against balancing. The first objection concerns the technique of balancing itself. It is a non-rational technique, it is a rhetoric technique, which may be used to reach almost any result[152]. It simply hides value-decisions under an appearance of correctness, «it is nothing more than an arbitrary and rash Solomonic settlement»[153]. Robert Alexy has proposed a system of rationalized balancing that, even if it cannot make predictable all its results, shows how balancing somehow constrains to a rational process[154]. He suggests a systems based on the principle of proportionality, which requires to treat rights as "optimization requirements"[155] and which is composed of three sub-principles: principles of suitability, necessity, and proportionality *strictu sensu*[156]. However, balancing remains a process that cannot be turned in completely technical because it will always include a less predictable, and not based on simple logic, side: the moral judgement on the weight of the conflicting rights. This problem is linked to a second type of critique that is advanced against balancing: human rights are objective entities and decisions about them should be treated as either right or wrong[157]. Balancing instead is a process of weighting between values, that does not lead to right or wrong results, because it moves in the realm of subjectivity, where things depend on points of view, and in particular depend on value-judgments about which right is more important and which is to be restricted the most.

Whether or not we can accept the fact that balancing is a technique that concerns values, interests, benefits and weights[158] depends on our conception of the relationship among human rights, on which two main theories have been developed.

- *Irenist* theories[159]: fundamental rights are a coherent and ordered system, hence there are no real conflicts between them.

[151] (Moller, 2012, p. 137).
[152] (Pulido, 2006, p. 196).
[153] (Pulido, 2006, p. 196).
[154] (Alexy, 2002).
[155] (Alexy, 2005, p. 572).
[156] (Alexy, 2002).
[157] (Pulido, 2006, p. 199).
[158] (Webber, 2010).
[159] (Celano, 2013, pp. 138–140; Pino, 2010, pp. 144–146).

- Monist declination: the human rights system can be read under one principle that gives us answers about which right prevails on the others in a certain situation;

- Minimum core declination: human rights are only a small core of rights, which is precise, determined, binding and non-conflicting. This declination usually excludes social rights and new generation rights.

- Illusory conflict declination: the real meanings of rights are not conflicting. They only appear as such because of their theoretical formulations.

- *Pluralist* theories[160]: human rights are not a coherent system with a determined order or a fixed hierarchy. Hence conflicts are real.

For irenist theories balancing may lead to revealing the real true hierarchy existing between two or more rights, or to unveiling the fact that the conflict is illusory, or to reminding which the real core rights are[161]. Pluralist theories instead regard balancing as a necessary technique, required to determine, case by case, the most appropriate hierarchy among conflicting interests and to determine which rights bend for another. Pluralist theories seem to be more appropriate to describe the realities of human rights. Rights are the results of complex historical and cultural processes that reflect heterogeneous values, ideals, and interests. They are not the product of a reasoned system created to be comprehensive and coherent. Hence, choosing a pluralist conception, balancing of rights and interests is necessary, even though it may appear as a shortcut to resolve moral problems[162].

Everyone's rights?

Is it adequate to think of human rights as blankly *universal*, i.e. identical for every person, whatever internal and external characteristics they might have? Debate on this question is still wide open on many fronts, as many challenge the idea that human rights are independent from epoch, culture and place, and challenge the idea that human rights are only and always individual-centred. The practice and rhetoric of human rights have evolved in ways that partially overcome such blank *universality*. Bobbio describes this evolution as being characterized by four main steps that end with the current *specialization*, as opposite to *universalization*, of

[160] (Celano, 2013, pp. 145–148; Pino, 2010, pp. 164–165).
[161] (Pino, 2010, p. 147 ff.).
[162] (Moller, 2012). Today, in multicultural societies, the process of balancing might even be more necessary because courts and constitutional courts find themselves facing new conflicts of interests that had not been contemplated by the writers of the constitution. Flexible hierarchies to adapt and create case by case are more and more necessary to save the State from anachronistic interpretations of the constitution.

human rights[163]. Initially, he says, in the XVII century's Europe, the Natural Law theory abolished differences between citizens and non-citizens, and between people belonging to different social classes through the myth of the *state of nature,* and declared all human beings (or at least all those perceived as such) holders of the same rights. During the Revolutions and in the two following centuries human rights become legal rights, embedded in Constitutions, and therefore lose their theoretical universality and are restricted only to the citizens of the State. After World War II, and in particular since the adoption of the Universal Declaration of Human Rights (1948) and the International Covenants (1966), human rights encountered a new wave of *universalization*. They became part of the global political agenda and turned into standards for assessments, criticism, aspiration and evaluation of political and economic organizations[164], to the point of becoming, as Charles Beitz argues, a *global concern*, whose «systematic violation in a society over a period of time could justify some appropriate form of remedial action by agents outside of the society where the violation occurs»[165].

The last of the steps described by Bobbio witnesses the ri-emergence of *differences* in human rights rhetoric[166]. Differences become the justification for the recognition of *different* rights to certain categories. Human beings, all recognized as equal holders of dignity and personhood, are perceived as holders of specific needs on the ground of gender, age, and other conditions, precisely to uphold their dignity and personhood. At the international level, many Declarations and Conventions are adopted to promote the rights of women, children, minorities, disabled, and, among them, indigenous peoples.

Is it possible to consider these rights as *human* rights? Aren't the latter, by definition, rights belonging to all humans? It does not help to think that every person was a child, everyone can become aged and might acquire some disabilities. It is in fact quite unlikely (though maybe not impossible) for a man to become a woman or for a Londoner to turn into an indigenous community member. However, these specific rights ultimately protect very important interests essential for the dignity and personhood of these specific people. In order to protect and uphold dignity and personhood, certain people have special needs and interests to be guarded. For example, the women's rights movement started in the second half of

[163] (Bobbio, 1988, pp. 438–439).
[164] (Beitz, 2001, p. 269).
[165] (Beitz, 2003, p. 44).
[166] (Bobbio, 1988, p. 439).

the XIX century with the request to abolish all differences between men and women, so to all be recognized the same rights[167]. In the XX century, the movement changed strategy and began to underline gender differences in order to obtain the recognition of specific rights, rights which might be meaningless for men (as those connected to pregnancy) but which are essential for the protection of women's dignity and personhood. The same can be said for indigenous peoples' rights. They are rights reserved to a specific category of people, and may appear as discriminating towards all other human beings. But it is exactly the particular characteristics of indigenous peoples that have led to the recognition of certain *specific* human rights to protect and uphold their dignity and personhood[168].

Critics to human rights

The critique of the universalism of human rights does not end with the recognition of differentiated rights for different categories of human beings. Another important question that has been raised concerns whether it is appropriate to talk about human rights in the global arena, where cultures are very heterogeneous and differ deeply from *Western*[169] culture, where the concept of *human rights* has evolved. The world is made of cultures where the content and sometimes even the concept of human rights appear theoretically and practically problematic[170]. Those who challenge the idea of human rights as applicable to everyone everywhere, referred to as *relativists*, accuse supporters of the opposite approach to promote a system created by Western countries to perpetuate their political and cultural hegemony trough the imposition of alien ideas on different legal and cultural systems.

For example, Ronal Niezen[171] argues that indigenous peoples «challenge the exclusively individualistic approach to human rights and stand apart from the usual prescription of human rights on the basis of individual protection»[172]. The engagement of indigenous peoples in a global movement for the recognition of rights is considered by Niezen a political strategy in order to fight the political, economic and cultural dominance of States. In order to do so, indigenous peoples

[167] (Facchi, 2007, p. 84).
[168] See more on indigenous peoples' rights below at 2.3.3.
[169] The term *Western* is here used to describe the legal and economic system prevailing in Europe, North America, Australia and New Zealand (and, increasingly, Republic of South Africa). It is, indeed, an oversimplification, that builds on a common but implicit understanding of the term, and that would benefit from a deeper analysis.
[170] (Facchi, 2007, p. 147).
[171] (Niezen, 2003, p. 118).
[172] (Niezen, 2003, p. 133).

have had to learn to use *Western* instruments and speak their language, i.e. the language of written law and human rights. Human rights have been conceived since their beginning as individual rights, as means for the protection of certain interests and needs of individual subjects[173]. They are individual rights recognized to *all* individuals but as single, self-standing entities. Indigenous claims, instead, focus on collective human rights, or group rights, as an instrument for the protection of *peoplehood*[174], rather than of personhood. This transformation may indeed influence the mainstream debate on human rights, for instance joining other movements that promote a shift towards collective, rather than individual, rights, such as *communitarianism*[175].

In the last 20 years there has been a return of the centrality of the idea of community. The political philosophers that have been called, mostly by their critics[176], *communitarians*, have rediscovered the existence and importance of communities, as something to be preserved and enhanced because of their role in the construction of the identity of human beings. Communities are perceived as the *locus* of development of human beings through the sharing of common practices, social understandings and cultural traditions[177]. This set of shared assets is perceived as the ground for the construction of common values, principles and ideas of justice. Communitarians refuse the idea of the existence of one single theory of justice, abstract from any community and applicable, *universally*, to all human beings.

Communitarians do not have aspirations towards the neutrality of the State, common in liberal philosophers and politicians. In liberal philosophers theories, the neutral State should promote the self-determination of its citizens. Each individual is considered free to self-determine its path to wellbeing, to follow its

[173] (Waldron, 1984, p. 1).
[174] The concept of peoplehood was first developed by the anthropologist E. H. Spicer (1962). He used the term to describe a sense of identity based on: a particular relationship to the land, common spiritual bonds and language (Corntassel, 2003, p. 91). The term is here used as the counterpart of personhood. Human rights have been considered to stem from the need to protect certain needs essential for personhood (Griffin, 2001). If personhood is understood as the ability to deliberate, assess, choose, and act to do what a person sees as a good life for herself, the same can be for the protection of certain rights of indigenous peoples, essential for their peoplehood to be upheld.
[175] Before stepping into a brief description of communitarian theories, there is the need to choose a working definition of the term *culture*. It is a term that has been defined in many different ways, often depending on the scientific context it is used in. For the purpose of this work the definition that has been found more appropriate is suggested by R. Sacco, as part of his work in legal anthropology. He defines culture as the heritage of knowledge, values customs, beliefs, worldviews and legal systems of a community (Sacco, 2007, p. 13).
[176] (Bell, 2013).
[177] (Kymlicka, 2002, p. 209).

preferences, regardless of common practices[178]. Individuals can question roles generated by economic, social, religious, sexual or other relationships[179]. Along with the Kantian view, each person shall pursue her own ends, and be an end in herself. Communitarians, instead, picture a State that leads its citizens towards a certain way of life, the way that conforms to the shared conception of "good life", the way that follows the common practices, beliefs and principles of the community. The purpose of individual actions is not ones' private good but the common good of the community. Therefore social roles and rules shall be accepted and followed, not questioned – especially not to the extent of harming the survival of the community and of its way of life. But what is the «scope and scale of the community they refer to»[180]? Is it possible to divide the world in distinct cultures, one for every community and therefore deduct the roles and rules that each person shall follow from such a division? Jeremy Waldron argues that it is more appropriate to describe each person as belonging to a mix of cultures, that he calls a "cosmopolitan community"[181].

In order to learn from communitarian theories without assenting completely to them, Will Kymlicka suggests looking at them as involving two different strains. A first conservative strain that looks backward, to a past where society functioned better and had not yet been eroded by the «increasingly aggressive assertion of individual and group diversity [...] such as feminism, gay rights and multiculturalism»[182] that undermine the sense of community. This first strain is a camouflage of traditional conservatism, necessary clashing with the recognition of individual autonomy and freedom[183]. The second strain, instead, does not rest on "illiberal values"[184]. It is concerned with the survival of «bonds of ethical community in an era of individual choice»; it accepts that we live in multicultural societies and attempts to give centrality to culture and community other then to individual wills and desires. This second strain of communitarianism, though often blended with the first strain, is very valuable because it raises important questions in the debate on human rights.

For the purpose of this thesis it not necessary to part for or against communitarian, relativist or universalist thesis. It was although necessary to give a brief account of them in order to place biocultural rights in the current human rights debate.

[178] (Kymlicka, 2002, p. 220).
[179] (Kymlicka, 2002, p. 221).
[180] (Waldron, 1995, p. 95).
[181] (Waldron, 1995, p. 95 ss).
[182] (Kymlicka, 2002, p. 271).
[183] (Kymlicka, 2002, p. 272).
[184] (Kymlicka, 2002, p. 272).

2.3.3. Groups' Rights as Human Rights

From individual rights to groups' rights

Regardless of their many critiques, the challenges communitarians have posed to the liberal conception of human rights have fuelled the debate on new ways to understand human rights. Particularly relevant for this research is the idea of human rights as group rights. From the moment the role that communities play for the development and wellbeing of each individual subject has gained centrality, it has been advanced a call to provide communities themselves some type of protection in the form of collective, or group, rights.

As we saw above, human rights are born as universal individual rights, recognized to every person, regardless of other characteristics. However, they then encompassed rights of specific categories of people, as women, children and indigenous peoples: hence rights that belong to certain groups of people, rather then to everyone. The term group rights describes «rights held by a group as a group rather than by its members severally»[185]. They shall not be confused with the rights held only by the members of a certain group and not by the rest of humankind. So for example women's rights are not rights of women as a group but rather are individual rights ascribed to a category of people, a group, that share certain characteristics considered relevant for the entitlement of certain rights. The relevance of their special rights does not stem from their being a group but rather from being individuals with particular characteristics. An imaginary last woman on Earth would still be a woman whose interests would need to be protected by reference to special women rights.

The key questions concerning groups and rights are: 1) can groups be right-holders; 2) may group rights threaten the rights of individuals?

1) The first question can be split into two parts: whether groups have the necessary characteristics to be right-holders; and whether group rights protect something that goes beyond the sum of the interests of the group members, or are «ultimately reducible to the interests of their individual members»[186].

For what concerns the first issue, James Nickel suggests that most ethnic groups, in particular those without territories, lack two requisites to be right holders:

[185] (P. Jones, 2014, p. 1).
[186] (Kymlicka, 1995, p. 13).

effective agency and *clear identity*[187]. They, Nickel argues, are often not able, as a group to form and pursue goals and evaluate actions and strategies, gather information and recognizing and following norms[188]; and they often do not have clear boundaries, hence it not being possible to determine who is a member and who is not. However he does not completely discharge the idea that certain groups may have such requisites and may therefore be right-holders. In particular, he suggests that ethnic minorities, such as indigenous peoples, may have such characterises even though they, especially at the beginning of their struggles to obtain recognition, might not yet be able to fully exercise them without the support of external agents (such as non-governmental organizations and international agencies).

For what concerns the second issue, Vernon Van Dyke suggests that certain group rights might be reducible to the individual rights of their members, while others, such as the right to self-determination, cannot be reduced and belong to "groups as corporate units"[189]. It is illogic and unjust, he argues, to recognize the existence of rights and duties of States while not those of ethnic communities[190] because certain communities have interests that are not the mere aggregation of the interests of their members. Michael Hartney argues the opposite. For him, all group rights are reducible to individual rights. The right to self-determination is a good to be preserved because it benefits the members of the group whose self-determination is recognized[191]. Hartney argues that «only the lives of individual human beings have ultimate value, and [therefore] collective entities derive their value from their contribution to the lives of individual human beings»[192].

It might always be possible to find an individual interest correlative to a group interest, or a community interest. The right to self-determination does benefit also the single members of a community. What matters however, when we talk about group rights, is not to make sure that there are not individual interests protected thereby. What really matters is to understand if a certain group right is more than the sum of the rights of its members. The right to self-determination, for instance, has a different meaning if attributed to a community or to a person. An individual right to self-determination concerns the right to determine the path of his or her life. The right to self-determination of a group, instead, concerns the control over

[187] (Nickel, 1997, p. 235).
[188] (Nickel, 1997, p. 235).
[189] (Van Dyke, 1995, p. 32).
[190] (Van Dyke, 1995, p. 54).
[191] (Hartney, 1995, p. 208).
[192] (Hartney, 1995, p. 206).

the destiny of the collective life of the group, not the mere sum of the lives of its members[193]. If one or more members of the group (self-)determine to leave the group, they are not exercising the right to self-determination of the group, but their own right. If the assembly or the leader of the group (self-)determine to dismiss the group, or to change its name or location, or to adopt new rules, they are exercising the right to self-determination of the group and are doing things that no single member has the right to do. Group rights are rights that belong to a certain community regardless of who the members are: if one or more members leave the group or new people join it, the holder of the group rights remains unchanged because it is the group itself, not its members[194].

2) The second question concerns the fact that if groups have rights not reducible to the rights of their members, then these two sets of rights may be in conflict[195] and the rights of the individuals within the group may be threatened[196]. In order to overcome this potential conflict and in order to protect the centrality of individual rights, Kymlicka suggests to look at group rights predominantly as rights directed outwardly - as protection from other groups - rather then inwardly – towards the members of the groups[197]. This especially when dealing with non-voluntary groups whose membership is not properly chosen, such as ethnic and linguistic groups. While it is true that group rights, especially if directed towards the members of a group, can be source of oppression and unjust treatments, it is also true that it depends on the content of the rights[198] and on the structure of the group. As Peter Jones notes, «the right of a group collectively to make decisions that bind its members severally is a simple description of democracy»[199]. There is no logical impossibility to affirm that groups can hold rights, also directed inwardly. Moreover, it should be kept in mind that also individual rights may conflict with other individual rights, and that forms of balancing are needed just as much as they are needed to regulate potential conflicts between group rights and individual

[193] (P. Jones, 2014, p. 2).
[194] (P. Jones, 2014, pp. 6–7).
[195] (Kymlicka, 1995, p. 13).
[196] (Hartney, 1995, p. 209; Vitale, 2000, p. 17).
[197] (P. Jones, 2014, p. 26). Kymlicka distinguishes two categories of rights aiming at protecting the stability and self-preservation of a cultural or ethnic community: group rights and special rights. The first category protects communities from internal dissent and the second from external dissent. Group rights are rights that communities have as community, independently from the interests of the members of the community. The community is described as a self-standing entity, whose existence and flourishing has a value *per se* and, therefore, deserves protection. Special rights instead, Kymlicka argues, are rights of certain people as members of a certain group. They can also have the form of individual rights and regulate inter-group relations: special rights «compensate for unequal circumstances which put the members of minority cultures at a systemic disadvantage in the whole marketplace, regardless of their personal choices in life» (Kymlicka, 1994).
[198] (P. Jones, 2014, p. 28).
[199] (P. Jones, 2014, p. 25).

rights, or between the rights of different groups. Finally, as Jones notes, there are certain individual rights that need group rights to be pursued successfully[200]. For example the right of a member of an indigenous people to enjoy a life in a flourishing indigenous community that pursues its own ends on the ground of its customary laws and spiritual beliefs, needs the recognition and enforcement of the group right to self-determination.

Are there certain types of groups that are more than others in the position to be justly entitled such rights? Usually, ethnic groups (including cultural minorities) are the focus of group rights discussion. Thomas Pogge argues that ethnic groups should not be favoured in the distribution of group-specific rights over groups of other types[201]. Moving from «the ideal of treating all citizens as equals, regardless of their identifications and affiliations»[202] he opposes treating some types of groups as «more valuable then others». Pogge suggests that group-specific rights «can be justified as compensation for unfair disadvantages that groups and their members suffer in comparison to others»[203], regardless of whether they are ethnic or non-ethnic groups. Anaya, responds to Pogge's suggestion underlining that «effective realization of equality requires in many instances differential treatment of ethnic groups in ways not necessary for, or even relevant to, other types of groups»[204]. Ethnic groups, Anaya argues, are «defined substantially by distinctive cultural attributes»[205] and the flourishing of diverse cultures is a value protected by human rights law[206]. Because of their diversity, that may extend to encompass political economic realms[207], minority cultural groups are in fact in particularly vulnerable positions and for this reason need special protection. The most relevant group right of ethnic minorities, and in particular of indigenous peoples, is the right to self-determination. A brief account of the rights to self-determination of indigenous peoples given in the next section.

Group rights and indigenous peoples: the right to self-determination

The the UN Charter and the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights[208]

[200] (P. Jones, 2014, p. 30).
[201] (Pogge, 1997).
[202] (Pogge, 1997, p. 188).
[203] (Pogge, 1997, p. 204).
[204] (Anaya, 1997, p. 223).
[205] (Anaya, 1997, p. 223).
[206] (Anaya, 1997, p. 223).
[207] (Anaya, 1997, p. 225).
[208] Articles 1 of both Covenants state «1. All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development. 2. All peoples may, for their own ends, freely dispose of their

recognize the right to self-determination to all peoples. However, who are the "peoples" to whom the right is recognized and what does the right entail is not yet clear in the international political arena[209].

Anaya identifies self-determination with «a universe of human rights precepts concerned broadly with peoples, including indigenous peoples, and grounded in the idea that all are equally entitled to control their own destinies»[210]. The right to self-determination of indigenous peoples has been object of many studies, in particular since the 1986 UN Study on the Problems of Discriminations Against Indigenous Peoples. «Indigenous representatives have repeatedly stressed that they view the recognition of their right to self-determination as essential for their survival»[211]. As Anaya very simply and clearly explains: «today indigenous peoples seek to roll back the inequalities lingering from historical patterns and defeat the contemporary barriers to the ability to flourish as distinct communities on lands to which their cultures remain attached»[212]. The two most common arguments used by indigenous peoples to ask for the recognition of self-determination rights are: its recognition is a «formal proclamation of denouncing the policies of destruction and assimilation that they have experiences in the past»[213]; and self-determination is necessary for the diversity of their cultures to continue to flourish and develop along with their cultural, social, legal and economic principles and endogenous paths. For what concerns local communities it is instead necessary to draw a separation line. Almost all studies have focused on self-determination of indigenous peoples rather then local communities because the latter have only recently appeared in the international political and legal arena. As will be analysed below[214], local communities are still usually referred to as holders of rights only in relation to their role as environmental stewards[215]. Hence there still is little work on local communities' right to self-determination. Even though, as done by the Inter-American Court on Human Rights, local communities have sometimes been associated to indigenous peoples as rights-holders, most legal and political documents refer only to the right to self-determination of indigenous peoples. As underlined below[216], biocultural rights could be used as a tool to extend certain

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natural wealth and resources without prejudice to any obligations arising out of international economic co-operation, based upon the principle of mutual benefit, and international law. In no case may a people be deprived of its own means of subsistence».

[209] (Xanthaki, 2007, p. 136).
[210] (Anaya, 1996, p. 98).
[211] (Xanthaki, 2007, p. 131).
[212] (Anaya, 2009, p. 2).
[213] (Xanthaki, 2007, p. 132).
[214] See above at 1.3.1.
[215] (Harry Jonas et al., 2013, p. 24).
[216] See below section 4.3.2.

aspects of the right to self-determination of indigenous peoples to local communities. However, this section focuses only on the right to self-determination of indigenous peoples.

The term, because of its immediate association with decolonization and independence movements, is often associated with secessionism, militaristic and peace threatening ethno-nationalism, and conflicts between minorities[217]. A wide open recognition of the right to self-determination to all peoples would endanger the political stability and territorial integrity of States as it would justify claims – also military claims – for independence and secession all around the globe. Many States have in fact revealed the fear that also the recognition of the right to self-determination to indigenous peoples may threat their territorial integrity[218]. For this reasons, many indigenous rights' advocates, among which predominantly Anaya, have underlined that indigenous peoples have been pushing for a different type of self-determination that does not entails secession and independence[219]. Self-determination is called for as the overarching right, the prerequisite for the realization of all other indigenous rights, but not in the form commonly known as *external* self-determination, the act by which a people regulates its international status free from alien rule. Indigenous peoples have, instead, predominantly been claiming for *internal* self-determination. Internal self-determination is aimed at asserting identities, preserving languages, cultures, and practices and at maintaining traditional governance structures[220]. Looking at it closely, as suggested by Anaya, the dichotomy internal/external self-determination is sometimes ill-suited to picture the calls of indigenous peoples. External self-determination is not really relevant for indigenous peoples and internal self-determination is too narrowly focused on political participation to the government of a State[221]. Instead, indigenous peoples are precisely those communities that do not necessarily fall within the borders of States, and find themselves across borders of different States. For this reason, Anaya argues that indigenous peoples need a special type of self-determination that goes beyond the relationship *vis à vis* national States. The UNDRIP suggests ways of understanding self-determination in line with the ILO Convention 169, which recognizes indigenous aspirations «to exercise control over their own institutions, ways of life and economic development and to maintain and develop their identities, languages and religions, within the

[217] (Anaya, 1996, p. 98, note 4).
[218] (Xanthaki, 2007, p. 140).
[219] (Xanthaki, 2007, p. 146).
[220] (Anaya, 1996, p. 111).
[221] (Anaya, 1996, p. 105).

framework of the States in which they live»[222], but which does not recognise self-determination rights. Article 3 of the UNDRIP describes the right to self-determination of indigenous peoples as the right to determine their political status and pursue their economic, social and cultural development goals without the need to create independent States. Moreover, UNDRIP underlines rights of indigenous peoples *as members* of the States where they reside: right to citizenship (art. 6), right to consultation before adoption and implementation of legislations and policies that may affect them (art. 19[223]). Article 5 brings together self-determination and State sovereignty affirming that the right to distinct institutions does not impede their right to participate to State institutions[224]. And finally, the closing article explicitly refuses any action that may dismember the territorial or political integrity of sovereign states (art. 46[225]).

Anaya suggests to look at the right to self-determination as composed of five core elements, without which it cannot be fully realized: non-discrimination, cultural integrity, access to lands and resources, social welfare and development, self-government.

Non-discrimination. This principle is recognized in most international declarations and convention on human rights: the Universal Declaration on Human Rights, the International Covenants, the International Convention on the Elimination of All Forms of Racial Discriminations, and the UN Declaration on the Rights of Minorities. It is the foundation of the protection of the rights of minority groups[226], because it requires the recognition of equal rights to all, including minorities, and because it calls for the recognition of *special rights* to minorities. *Non-discrimination* moves from the assumption that only through the recognition of such rights minorities can be assured to have *de facto* equal protection for their

[222] Preamble of the ILO Convention 169.
[223] Article 19 UNDRIP: «States shall consult and cooperate in good faith with the indigenous peoples concerned through their own representative institutions in order to obtain their free, prior and informed consent before adopting and implementing legislative or administrative measures that may affect them».
[224] Article 5 UNDRIP: «Indigenous peoples have the right to maintain and strengthen their distinct political, legal, economic, social and cultural institutions, while retaining their right to participate fully, if they so choose, in the political, economic, social and cultural life of the State».
[225] Article 46 UNDRIP: «Nothing in this Declaration may be interpreted as implying for any State, people, group or person any right to engage in any activity or to perform any act contrary to the Charter of the United Nations or construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States».
[226] (Bloch, 2001, p. 376).

interests, needs and identity and «for the preservation of those characteristics and traditions which distinguish them from the majority of the population»[227].

Cultural integrity. It addresses the need of every person to take part in the cultural life of her own community, to participate to its development, to use and practice its language, religion, art, customs and scientific and literary production[228]. In particular, articles 8, 11, 12, 13, 14 and 31[229] of UNDRIP call to the respect of indigenous cultural heritage (which includes: knowledge of lands and their natural components, practices, arts, literature, religion, rites, philosophy) and demands States to respect and protect it from forced assimilation.

Access to lands and resources. Access to lands and natural resources is the essential for the realization of not only all other aspects of the right to self-determination of indigenous peoples, but of their survival[230]. Because of their special connection with them, lands and natural resources cannot be treated as «fungible with cash»[231]. As Article 13(1) of ILO Convention 169 states, «governments shall respect the special importance for the cultures and spiritual values of the peoples concerned of their relationship with the lands or territories, or both as applicable, which they occupy or otherwise use, and in particular the collective aspects of this relationship». Indigenous rights to lands and natural resources are in fact not understood as private property claims, but rather as claims for collective property[232]. And they shall entail, not only the respect of existing relationships with ancestral lands, but also, where possible, the relocation of evicted communities.

Social welfare and development. It entails those economic and social-welfare rights - such as right to health, to an adequate standard of living and the right to education (that shall not limit the right to pass on traditional knowledge through

[227] (Bloch, 2001, p. 377).
[228] These rights are listed in article 27 of the Universal Declaration of Human Rights; article 15 of the International Covenant on Economic, Social and Cultural Rights; article 13c of the Convention on the Elimination of All Forms of Discrimination against Women; article 31 of the Convention on the Rights of the Child; and article 4 of the UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities.
[229] Article 31 UNDRIP: «Indigenous peoples have the right to maintain, control, protect and develop their cultural heritage, traditional knowledge and traditional cultural expressions, as well as the manifestations of their sciences, technologies and cultures, including human and genetic resources, seeds, medicines, knowledge of the properties of fauna and flora, oral traditions, literatures, designs, sports and traditional games and visual and performing arts. They also have the right to maintain, control, protect and develop their intellectual property over such cultural heritage, traditional knowledge, and traditional cultural expressions».
[230] (Anaya, 1996, p. 104).
[231] (Anaya, 1996, p. 105).
[232] (Anaya, 1996, p. 106)

customary teaching techniques) - needed to maintain and develop traditional practices essential to the culture of an ethnic community[233]. These rights shall be the basis for the realization of the right to development of each indigenous people defined by the Declaration on the Right to Development – adopted in 1986 by the UN General Assembly - as the right to «participate in, contribute to, and enjoy economic, social, cultural and political development, in which all human rights and fundamental freedoms can be fully realized»[234].

Self-government. Anaya identified two strains of indigenous peoples self-government[235]. The first strain relates to the possibility of each people to regulate its internal matters through the use of customary laws and institutions. Autonomy is essential for the continuation and development of distinct cultural identities, traditional practices and traditional knowledge. Rules and norms imposed by outside institutions undermine the preservation of internal practices. The second strain concerns freedom from imposition of decisions taken by external actors and concerning matters that can influence the community.

The right to self-determination, so heterogeneously composed, is the building ground for all other indigenous rights to be realized. As Cormac Cullinan writes, indigenous peoples «have not been asking for the dominant culture to extend certain human rights to them [but instead] to limit and reduce the extent of its influence and power and allow the indigenous communities to self-regulate to a greater extent»[236].

[233] (Bloch, 2001, p. 379).
[234] Article 1 of the UN Declaration on the Right to Development.
[235] (Anaya, 1996, p. 151)
[236] (Cullinan, 2002).

Part 3. Human Rights, the Environment and Indigenous Peoples and Local Communities

Chapter 3.1. *Conservation of the Environment and Human Rights: a Brief Historical Account*

As briefly touched on above[237], the conservation of the environment is one interests protected by the theoretical construct of biocultural rights. Deprived of it, the discussion would still be focused on indigenous rights as a type of minorities' rights. These two elements, human rights and environment conservation, may *prima facie* appear risky to compose as «environmentalists and human rights advocates have seldom been the cosiest bed-fellows»[238]. Nevertheless, today the protection of the environment has been widely recognized to be an essential element for the fulfilment of certain (if not all) human rights. But we shall not forget that conservation practices have not always been (nor are) respectful of human rights and have often happened to hinder their realization[239]. In this complex system of interdependence, the position of indigenous peoples and local communities has changed radically trough history: from evicted for conservation purposes (*fortress conservation*[240]), to holders of rights to be balanced with conservation goals, to valuable allies in conservation activities (*community-based conservation*[241]). The following sections will take us briefly trough the relationship between human rights and the environment. Last step - concerned with the contribution of IPLCs to conservation - after a brief focus on the roots of IPLC relationships (and perceived relationships) with the environment, will accompany us to the idea of biocultural rights, which builds, precisely, on the role that IPLCs may have for the conservation of the environment.

3.1.1. Interdependent Interests: Human Rights and the Environment

In the mid XIX century, States and peoples started to understand that technologies and development could cause harms to the environment. Initially, environmental protection agreements and laws that were created to avoid such damages were mostly aimed at defending economic interests over certain species and areas. Conservation activities were driven by considerations over single elements of

[237] See 1.1.
[238] (Rajan, 2011, p. 106).
[239] (Sunderland, Campese, Greiber, & Oviedo, 2009, p. XVII).
[240] See below at 3.1.2.
[241] See below at 3.1.3.

ecosystems, and did not focus on whole landscapes and on species' interactions[242]. As a response to the growing environmental crisis, in 1968 the UN General Assembly formally recognized the interdependence between environmental protection and basic human rights[243]. Four years later, in the Stockholm Declaration, issuing from the 1972 UN Conference on Human Environment, conservation of the environment was presented as essential to man's well-being and «to the enjoyment of basic human rights – even the right to life itself»[244]. They began to be perceived as «interrelated fundamental goals of the global community»[245] under the understanding that human impact on the environment was to be monitored and reduced, otherwise future as well as present generations would have not been able to respond to their needs and to live healthy and safe lives. In 2009 the UN High Commissioner on Human Rights reminded that «while the universal human rights treaties do not refer to a specific right to a safe and healthy environment, the United Nations human rights treaty bodies all recognize the intrinsic link between the environment and the realization of a range of human rights»[246].

To picture the relevance of environmental conservation for human rights protection we can look at the 1948 Universal Declaration of Human Rights (UDHR) and at the two 1966 International Covenants on Civil and Political Rights (ICCPR) and on Economic, Social and Cultural Rights (ICESC) to identify some recognized human rights that can have no fulfilment without a certain quality of environment[247]. Overexploitation and land degradation increase environmental hazards, therefore threatening the right to life and security of the person[248], and, consequently, the right to family[249]. If air, soils and water are polluted there can be no full respect of the right to a standard of living adequate for health, to the healthy development of the child[250], to hygiene[251], to well-being[252], and to a healthy work environment[253]. Moreover, there can be no respect of the right to food[254]. To

[242] (Meine, 2010, p. 10).
[243] (UNGA Resolution 2398 (XXII), cited in Sands, Peel, Fabra, & MacKenzie, 2012, p. 777).
[244] (United Nations, 1972).
[245] (Greiber, 2009, p. 5).
[246] (Report of the OHCHR on the Relationship Between Climate Change and Human Rights, UN Doc. A/HRC/10/61, 15 January 2009, para. 18, cited in Boyle, 2012).
[247] Of course, it is possible to look for those human rights in need for a certain level of environmental protection in any other international, regional or national human rights document.
[248] UDHR, art. 3; ICCPR, art. 6(1) and 9(1).
[249] UDHR, art. 16(3); ICCPR, art. 23; ICESCR, art. 10(1).
[250] ICESCR, art. 12 (2)a.
[251] ICESCR, art. 12(2)b.
[252] UDHR, art. 25(1); ICESCR, art. 12(1).
[253] UDHR, art. 23; ICESCR, art. 7b.

fulfil the latter it is also necessary the conservation of a certain level of biodiversity as it is the key to guarantee food security[255]. Therefore, «soil depletion, deforestation, overexploitation, and pollution represent a direct threat to»[256] human rights and contribute to the maintenance and exacerbation of poverty. There can neither be realization of the right to participate to social and cultural activities[257] and to profess religion[258] if pollution, wastes and ecosystems degradation make access to natural environments impossible or dangerous. So harming the right to rest and leisure as well[259]. The right to self-determination and development of peoples necessitates that wealth and natural resources are not polluted, exhausted or gone extinct[260]. Finally, quality of the environment is particularly important for the respect of the right of minorities, especially those physically isolated, to enjoy their own culture, religion and language[261].

3.1.2. Conflicting Interests: Human Rights and the Environment

While the acknowledgement of the link between environmental protection and human rights is now strongly recognized, its implementation has been and still is hugely controversial. «For just as the human rights protagonist has often given the impression that he or she does not care about the natural world, so too have some environmentalists seemed at times to despite people»[262] and to value birds more than people[263]. While it would be unfair to condemn all conservation projects, there are in fact many that have caused social and cultural negative impacts[264] - particularly on IPLCs - displacing communities from their lands, reducing or halting access to natural resources important for essential services (livelihoods, housing, building materials, water sources)[265].

Back to the Mesopotamia of the first millennium B.C., there are examples of lands enclosed for species protection[266]. Since the creation of the first national park, the Yellowstone National Park in Montana, in 1872, conservation of the environment,

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[254] ICESCR, art. 11.
[255] (World Resources Institute, 2005, p. 4).
[256] (World Resources Institute, 2005, p. 14).
[257] UDHR, art. 27(1); ICESCR, art. 15(1).
[258] ICCPR, art. 18(1).
[259] UDHR, art. 24; ICESCR, art. 7d.
[260] ICCPR and ICESCR, Art 1.
[261] ICCPR, art. 27.
[262] (Gearty, 2010, p. 21). See also Alcorn (2008).
[263] (Diamond, 2005, p. 441).
[264] (Brechin, Wilshusen, Fortwangler, & West, 2002, p. 45).
[265] (Campese, 2009, p. 7).
[266] (Morel, 2010, p. 174).

and in particularly protected areas conservation, has been institutionalized as being, by definition, separated from human life. In the attempt to conserve what is left pristine[267], or to recreate what was once pristine, people have been fenced out and kept away from protected areas and natural resources, regardless of their needs and of their real impact on it. People have long been perceived as a threat for conservation[268], as their interests were perceived as necessarily conflicting with those of ecosystems: environmental protection is about reducing the use of natural resources, peoples and communities use resources for their livelihoods, therefore their presence runs against conservation objectives. The vast use of land for the creation of national parks in America, Australia and Asia was made possible by the eradication of indigenous peoples through forced removal or decimation[269] on the ground of the tragedy of the commons theory[270]. This approach to conservation has been named *fortress conservation*[271] because it excluded local people from conservation-oriented areas. Fortress conservation created thousands of *conservation refugees*[272], mostly composed by indigenous peoples. One of the most famous examples is that of the Yellowstone National Park that was established on a Crow, Blackfeet, and Shoshone-Bannock territory[273], causing the eviction of seven indigenous tribes.

Looking at the issue from the opposite perspective we shall ask whether "human rights help or hinder the environment"[274]. The most common answer is that they are bound to hinder it. «The subject of human rights is [...] a field that is concerned

[267] The meaning of the term *pristine*, as of the term *conservation*, are themselves quite controversial. Different disciplines have given different definitions. If c*onservation* is understood as «actions that prevent or mitigate biodiversity loos and are designed to do so» (Hames, 2007, p. 180), it refers only to intentional, planned interventions and excludes those practices that simply happen to have conservation effects. The latter practices however, do fall within the realm of *sustainability*: practices that «meet the needs of the present without compromising the ability of future generations to meet their own needs» (World Commission on Environment and Development, 1987). *Pristine*, instead, is referred to ecosystems untouched by human activities, as opposed to human-influenced ones. This dichotomy has been contested by indigenous peoples and anthropologists, archaeologists and historical ecologists because many landscapes once considered *pristine* had in fact been modified by human activities in the past (Claus, Kai, & Satterfield, 2010, p. 266), and were, in fact, the result of the interactions between humans and nature, as it was recognized by UNESCO with the adoption of the World Heritage Convention that refers to *cultural landscapes* (Posey, 1995, p. 9). For some authors (Agrawal & Gibson, 1999, p. 632; Posey, 1999b, p. 7), since its appearance on the Earth, man has modified so many ecosystems that it is impossible and pointless to distinguish between real and apparent *pristine* ecosystems.
[268] (Claus et al., 2010, p. 268).
[269] (Claus et al., 2010, p. 263).
[270] See below at 3.2.2.
[271] (Maffi, 2014, p. 4).
[272] (Maffi, 2014, p. 4).
[273] (Sobrevila, 2008, p. 6).
[274] (Gearty, 2010).

not only with humans but also with the rights that flow from being humans, rather than from being anything else: not an animal, or a fish for example, and certainly not a tree or a habitat or a lake, no matter how magnificent»[275].

The need to reduce the exploitation of natural resources for the sake of conservation is usually received by the call of the poorest layers of society and of developing countries against the creation of limits to their right to use natural resources to exit their state of poverty. People need to use natural resources to survive, develop and prosper at very different levels. Local and rural communities need to have access to local resources to respond to their immediate needs, States need to use natural resources to increase their State-income and (hopefully) better respond to the needs of their populations. When conservation programs are implemented disregarding the rights of indigenous peoples and local communities over their lands and resources, poverty is exacerbated and indigenous peoples' survival as distinct cultural groups is threatened[276].

3.1.3. Conservation Allies: Indigenous Peoples and Local Communities

Conservation without communities involvement has turned out less efficient or even detrimental for biodiversity conservation[277] because indigenous peoples and local communities «serve numerous and important roles in protecting and maintaining natural areas»[278]. Moreover, conservation programs that disregard the rights of indigenous peoples and local communities have often turned out to be more expensive because of costs for displacements, compensations (when they are afforded) and creation of alternative livelihoods; harder to enforce due to the conflicts with the affected communities; not benefiting from the communities' traditional knowledge about the local environment; and having to face the fact that when communities are excluded from use of resources they lose interest in their long term conservation and are more likely to use resources unsustainably[279]. For example, the decision to evict indigenous communities from the Yellowstone National Park brought a considerable increase in the cost of creation and maintenance of the Park. Many battles occurred between indigenous groups and park managers, killing about 300 people. So only after the intervention of the USA

[275] (Gearty, 2010, p. 7).
[276] (Schmidt & Peterson, 2009, p. 1459).
[277] (Oudenhoven, Mijatovic, & Eyzaguirre, 2010, p. 8).
[278] (Schmidt & Peterson, 2009, p. 1459).
[279] (Agrawal & Gibson, 1999).

Army, 30 years after the beginning of the struggle, the area could start to earn money from tourism[280].

In the 1970s the *fortress conservation* approach (also known as *Yellowstone model*[281], *authoritarian protectionism*[282], or *fences and fines* approach) started to be rethought trough. This change in approach was driven by the increased recognition of the needs and rights of developing countries and local peoples and by the understanding of its, frequent, ineffectiveness[283]. Policy makers, conservationists and non-governmental organizations (NGO) began to pay more attention to communities and to their role for conservation and started to develop, when possible, community-based or rights-based conservation projects[284]. Since then, many studies have concentrated on the best approaches to community-based-conservation[285] and, more recently, there is the increasing understanding of the need to involve communities as active participants since the beginning of each conservation project, as holders of know-how and rights, rather than as passive stakeholders. This has led many to redefine environmental conservation in a more *social fashion*[286] with the aim to embrace, beside ecological goals, also social and political elements (such as: human dignity, legitimacy, governance, accountability, adaptation and learning, and non local forces[287]) and to balance conservation goals with the respect of the right to participation in policymaking, the right to self-representation and autonomy, and the right to sovereignty[288].

International actions such as the Man and the Biosphere Programme (1970), the United Nations Conference on the Human Environment (1972), and the World Conservation Strategy of the International Union for Natural Conservation (1980) are clear signs of this change in attitude[289]. Today, many international organizations working on conservation issues, such as the IUCN, the World Wildlife Fund, Conservation International, the United Nations Environmental Program and the Nature Conservancy, recognize the role of indigenous peoples for the conservation of biodiversity[290]. In particular, the IUCN has had a very central

[280] (Brigham, 2007, p. 552).
[281] (Sobrevila, 2008, p. 7).
[282] Authoritarian protectionism is the term used by Brechin *et al*. (Brechin et al., 2002) to refer to old fashion conservation that does not give the needed attention to human rights.
[283] (Berkes, 2004, p. 622; Meine, 2010, p. 13).
[284] (Agrawal & Gibson, 1999; Alcorn, 1993, p. 3).
[285] (Agrawal & Gibson, 1999; Berkes, 2004, p. 624).
[286] (Brosius & Russell, 2003, p. 55 cited in Berkes 2004).
[287] (Brechin et al., 2002, pp. 43–44).
[288] (Brechin et al., 2002).
[289] (Meine, 2010, p. 13).
[290] (Maffi, 2014, p. 4; Schmidt & Peterson, 2009, p. 1459).

role in stressing for a new way to manage protected areas that involves rather than excludes local communities. The IUCN World Conservation Congress has passed several resolutions on indigenous peoples in relation to issues such as protected areas, traditional biodiversity knowledge, forests, marine and coastal areas, and mining[291].

While it is too early to treat it as a one-direction change, as cases of evictions of indigenous peoples for conservation purposes are still *routine* and many still question the effectiveness of rights-based approaches, it is true that indigenous peoples have, at least the theory and rhetoric of conservation, started to move from the role of the passive victims to the role of (potential) allies.

[291] (Dilys Roe et al., 2010).

Chapter 3.2. *From Myth to Reality: Noble Savages and Ideological Traps*

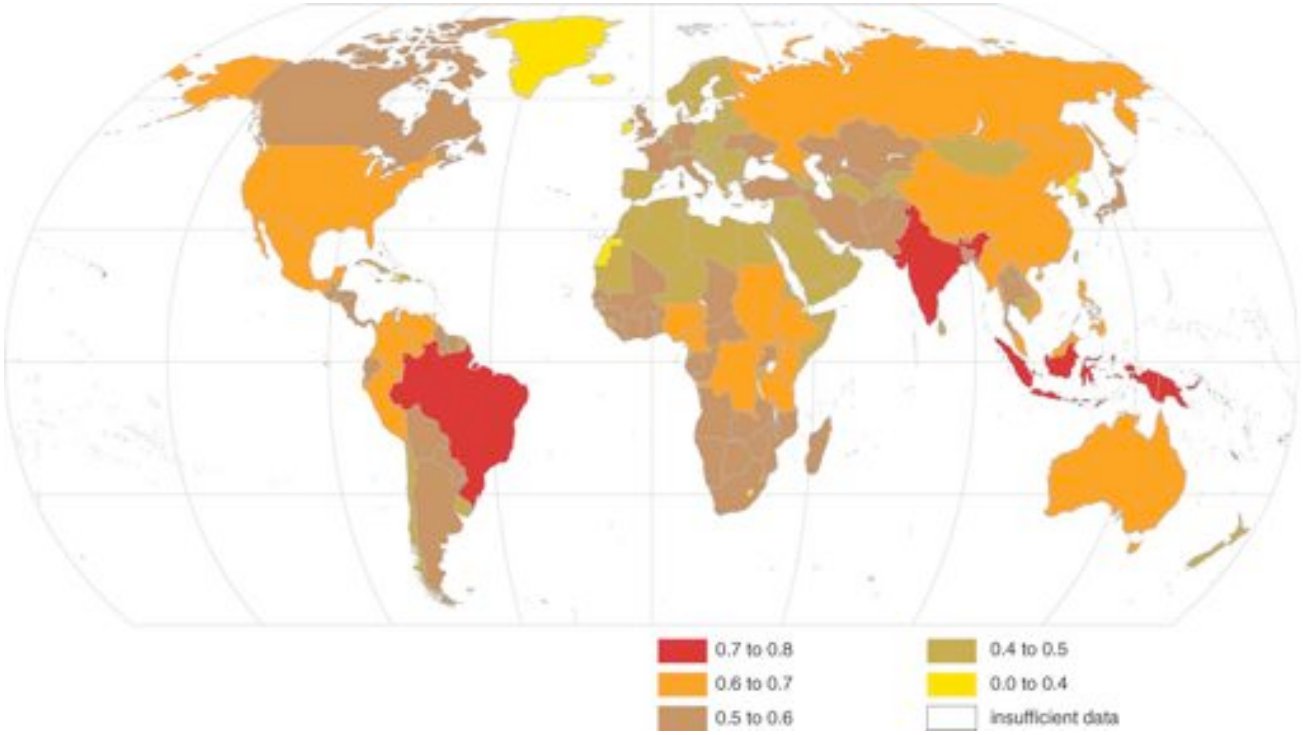
3.2.1. IPLCs and the Conservation of the Environment

The above section is based on the assumption that there exist IPLCs that have preserved environmentally sustainable lifestyles[292] and worldviews that allow them to live in biodiversity-rich areas without hampering the conservation of those areas and, in some cases, contributing to it. This assumption is questioned below[293], but as an introductory matter it is conceded that even if with many dissenting voices, scholars, international institutions and States are increasingly recognizing the role of IPLCs in the conservation of ecosystems[294]. IPLCs contribute to the conservation of biodiversity by safeguarding their very diverse ecosystems, using species sustainably, practicing techniques that maintain equilibrium among species, and selecting new varieties of domestic plants and animals[295].

The idea of the existence of a long-term sustainable and mutually beneficial relationship between certain communities and peoples and the environment was framed by Posey[296] under the term *biocultural diversity*[297]. The term refers to the existence of an *inextricable link* between cultural and biological diversity, as explained in the 1988 Declaration of Belém of the International Society of Ethnobiology[298]. It indicates «the idea that maintaining and restoring the diversity of life means sustaining both biodiversity and cultures, because the two are interrelated ad mutually supportive»[299]. The map below shows a significant

[292] Sustainable use and management of ecosystems means, roughly speaking, to have an organization that enables a community to respond to its needs without depleting biodiversity or degrading local ecosystems and that does not endanger the ability of future generations to do the same and to maintain a certain quality of life.
[293] See below 3.2.1.
[294] (Kothari, Corrigan, Jonas, Neumann, & Shrumm, 2012, p. 9).
[295] (Bèlair, Ichikawa, Wong, & Mulongoy, 2010, p. 9; Valderrama & Arico, 2010). In order to survive in a certain ecosystem it is necessary to rely on a sufficient variety of species of crops, livestock and veldt products. It would otherwise be impossible to face the normal variability of the environment (Gupta, 1991, p. 1). Each year differs from the others in terms of precipitations, temperature, wind and other factors such as the decrease or increase in certain species. Diversity of stored seeds, of bred animals and of veldt products known and used is essential to face such variations because each species may react differently to changes and while one variety may become unavailable and other may act as a substitute.
[296] (Posey, 1999a).
[297] This term has been used interchangeably with the term *biocultural heritage*.
[298] (Maffi, 2007, p. 267). The Declaration of Bélem was adopted at the first congress of the International Society of Ethnobiology as an explicit recognition of the obligation of scientists and environmentalists to compensate indigenous peoples for the utilization of their knowledge and biological resources and to address their needs. For more info on the Declaration and on the International Society of Ethnobiology visit: http://ethnobiology.net/.
[299] (Maffi & Woodley, 2010, p. 1).

correlation between the presence of biocultural diversity and indigenous peoples in the world. The map shows the relative measure of countries' biocultural diversity through the use of five indicators: number of languages, religions, ethnic groups (for the cultural diversity component) and number of bird and mammal species and number of plant species (for the biological diversity component)[300]. It was estimated that indigenous peoples' territories cover today about the 22% of the planet and that within these territories 80% of the total biodiversity of the planet is held[301].



Index of biocultural diversity IBCD-RICH. (Loh & Harmon, 2005)[302]

Ethnobiological and ethnoecological research provides evidence of the biocultural diversity of IPLCs: vast knowledge about the ecosystems of their lands and their biotic and a-biotic elements[303]; centrality of the environment in their practices and

[300] (Loh & Harmon, 2005, p. 236).
[301] (Sobrevila, 2008). This estimate does not include the territories occupied and managed by local communities because of the lack of data.
[302] As all types of maps obtained using *proxies* and non-comprehensive data, they should be regarded as *proxies* themselves. However, the core areas here identified overlap with those that have been identified in other works that have used different indicators (Maffi, 2005, p. 605).
[303] The relevance of a-biotic elements might be underestimated by the use of the term *bio*-cultural. For this reason some have proposed the use of the term *eco*-cultural diversity (Harry Jonas et al., 2012, n. 3). Even though eco-cultural diversity is more appropriate to describe the type of relationship that IPLCs have with their territories, in this work the term bio-cultural diversity will be preferred in order to remain consistent with most literature on the topic.

beliefs[304]; social, cultural[305], spiritual, economic and political practices shaped around the ecological elements of the territories where IPLCs reside, their nomadic routes, and their sacred sites[306]. IPLC territories have recently been gathered under the term "Indigenous Peoples and Local Communities' Conserved Territories and Areas (ICCAs)", defined as the «natural and/or modified ecosystems containing significant biodiversity values [...] conserved by indigenous peoples and local communities, both sedentary and mobile, through customary laws or other effective means»[307]. ICCAs diverge from the protected area model because they do not rest on a centralized management whose objective is precisely, and centrally, the conservation of the environment of a certain territory. IPLCs' territories, whether gathered under the name ICCAs or not, propose «a diversity of approaches to human interaction with the environment, entrusting *stewardship* [emphasis added] of particular ecosystems to the finely tuned cultural expertise that indigenous peoples have developed through millennial relationships with their ancestral lands»[308]. Those peoples and communities that have lived and continue to live away from mainstream societies and their markets and cities «know their lives and immediate futures – as well as the well-being of future generations – depend upon the environments in which they live and the biodiversity upon which they depend»[309]. They directly rely on local ecosystem services for their livelihoods, building materials and medicines. And their cultural and spiritual practices are built around natural sites, plants, animals, rivers and streams, shores. Hence, they know that the degradation of their surrounding ecosystem and the loss of biodiversity would profoundly threaten their survival and their culture[310]. Instead, industrial societies, whose peoples live mostly in cities, obtain their livelihoods from many different sources spread around the world and distribute their wastes away from their lands. Therefore, the overexploitation and destruction of one resource or ecosystem does not appear significant, because «they turn to another»[311] and easily «forget that as biological beings [they] are as dependent on clean air and water, uncontaminated soil and biodiversity as any other creature»[312].

[304] (Slikkerveer, 1999).
[305] (Dutfield, 1999, p. 550). Particular attention has been given to the correlation of linguistic diversity and biological diversity: because of reflections of environmental features in local languages, because of the their common areas of distribution, and because of common threats to their conservation (Maffi, 2005, p. 600).
[306] (Kothari et al., 2012, p. 19).
[307] (Kothari et al., 2012, p. 6).
[308] (Jaksa, 2006, p. 162).
[309] (Maffi, 2014, p. 4). See also (Maffi & Woodley, 2010, p. 4).
[310] (Posey, 1999b, p. 7).
[311] (Cocks, 2006, p. 188).
[312] (Suzuki, 1999, p. 72).

An increasing number of researches shows the different, but similar, relationships of care of IPLCs towards the environment[313]. One of the first comprehensive books on the topic is edited by Posey[314]. It is a collection of studies from different parts of the world that highlights the role that spiritual and cultural values of indigenous and local communities have for the conservation of biodiversity. More recently, the action-research project by the International Institute for Environment and Development, *Protecting Community Rights over Traditional Knowledge*[315], has described common customary values and worldviews in five indigenous communities in Kenya, Peru, Panama, and India. The communities, involved in a project aimed at finding *sui generis* instruments to protect traditional knowledge, have all shown to share *holistic worldviews* based on the assumption that everything in nature is inter-connected and inter-dependent: humankind is an element of nature and its traditional knowledge, practices and customary laws are as well. Everything in nature is worth respect and the exploitation of natural resources is regulated by customary laws whose enforcement is overviewed by Spirits or Gods[316]. Similarly a study by the Forest Peoples Programme[317] documented the sustainability of the use of natural resources by indigenous communities in Suriname, Cameroon, Guyana, Thailand and Bangladesh. The study shows that traditional knowledge and customary law systems of communities guide their wise use of the local resources under the idea of a spiritual connection with the lands. Further evidence has been provided by an extensive study organized by the IUCN and other supporting organizations on *sacred natural sites*[318]. The study provides evidence of the relevance of sacred natural sites, mostly attributed to indigenous and local communities, for biodiversity and ecosystems' conservation. A literature review from a hundred different studies from Africa and Asia[319] has shown that sacred meanings attributed either to nature itself or to heroes,

[313] (Cocks, 2006, p. 188).
[314] (Posey, 1999a).
[315] (Swiderska et al., 2009).
[316] The studies have also revealed that the communities are guided by the ethics of: reciprocity in exchanges with nature (as much as is taken is given back); equilibrium with nature (society must be in harmony with nature); and duality within nature (everything has a complementary opposite and balance must be kept) (Swiderska et al., 2009).
[317] (Forest People Programme, 2011).
[318] (Verschuuren, Wild, McNeely, & Oviedo, 2010). In the study, sacred natural sites are defined as: «areas of lands or water having special spiritual significance to peoples and communities» (p.1).
[319] (Verschuuren et al., 2010, p. 19).

structures or histories grounded in the territory[320], have led to the preservation of reservoirs of biodiversity[321] equally rich, or richer, than close-by protected areas.

3.2.2. Sustainable Lifestyles: Management of the Environment

What does it mean to act as a steward of an ecosystem and to conduct a sustainable lifestyle? To act as the steward or custodian of a land or ecosystem goes beyond its sustainable use. It conveys a sense of responsibility to ensure that lands and resources are maintained in a way that respects and enhances their intrinsic value.

Bavikatte has stressed that «biocultural rights are collective rights with a specific aim of affirming the right of stewardship of communities over their lands and waters» and, he continues, biocultural rights «seek to safeguard the stewarding relation between a community and its ecosystem»[322]. Bavikatte suggests that biocultural rights «differ from private property rights [...] and are asserted by communities that have traditionally had strong cultural and spiritual ties to their lands»[323]. Do IPLCs have special systems of property over lands and natural resources that lead them to act in more sustainable ways than other peoples? And if yes, what are they? Do they contemplate rules, obligations and rights that fall within the *concept*[324] of *private property* or do they have a different system of property [325]?

We could be tempted to say that indigenous legal systems have no such a thing as property. As Bavikatte argues[326], it is more appropriate to say that indigenous legal systems, or at least a majority of them, are not *private property systems*. If we in fact accept the definition of system of property provided by Waldron - «systems of rules governing access to and control of material resources»[327] - it seems

[320] (Verschuuren et al., 2010, p. 2).
[321] (Verschuuren et al., 2010, p. 1).
[322] (Bavikatte, 2014, p. 30).
[323] (Bavikatte, 2014, p. 30).
[324] (Waldron 1988, p. 31).
[325] Unfortunately it will not be possible here to explore case studies that picture the organization of property within different indigenous people, as an accurate understanding of the topic would require. The present research will draw on articles and studies that draw a general picture of indigenous peoples. It means to draw on generalizations that have already been constructed. Before indulging within them a word must be said on the vast diversity that exists among IPLCs around the word. The generalizations that will be used here, as all generalizations, will picture only the legal traditions of some IPLCs. In particular, they will picture only the traditions of some of the communities that have preserved sustainable lifestyles.
[326] (Bavikatte, 2014, pp. 30–49).
[327] (Waldron, 1988, p. 31). The definition of Waldron only concerns material resources because, he explains, not all societies may have a system of property rules to allocate non-material resources, such as knowledge, reputation, ideas, either because they are not part of their «ontology or, if they do, because human relations with them are not conceived in terms of access and control» (Waldron 1988, p. 34). In the last decade the debate about indigenous

impossible to picture a community without any property system. Property rules provide a solution to problems of allocation of material resources within a society[328], a problem that each and every society has. Only a society living in a condition of lack of scarcity of resources would not need to allocate their access and use. In such a society, as in Eden, there would be enough of anything to satisfy everyone's needs, so there would be no need to organise the allocation of resources. Since no community lives in any Eden-like condition we can with certainty affirm that all IPLC legal systems include property rules that regulate access and use of material resources, such as natural products, and lands. IPLC property systems, though very diverse, can be enclosed in the category of *commons*, or as Elionor Ostrom calls them, common-pool-resources systems. Before moving into a brief exploration of IPLC property system, it is useful to provide a concise account of private property systems in order to underline the main differences between private property and commons property.

Private property

Not all scholars agree on the possibility to provide a definition of what private property is because its features vary too much from a legal system to another. Waldron recognizes the existence of very different features in different legal systems but claims that there are certain common features that can reasonably be attached to the concept of private property. He defines private property systems as: «systems of governing access to and control of material resources, organized around the idea that resources are on the whole separate objects each assigned and therefore belonging to some particular individual whose decision as to the use of the resource is taken as final»[329]. He argues that in a *private property system*, usually, the holder of the private property title holds certain rights over the object X[330]:

- a right to posses, use, not use, and manage X;
- a right to the income derived from permitting others to use X or from its capital value;
- a right to security against expropriation by other people;

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peoples and property rights has been centred mostly on the issue of property of traditional knowledge. Traditional knowledge is an intangible good and therefore falls within a category of goods different from lands and natural resources.

[328] (Waldron 1988, p. 32).

[329] (Waldron, 1988, p. 38).

[330] (Waldron, 1988, p. 49).

- the power to transmit X by sale, gift or bequest;
- lack of any term on any of these rights;
- liability that certain judgments against him may be executed on X;
- expectation that when rights to X of other peoples come to an end they come back to him.

However, Waldron underlines, these features are not necessarily present in all private property systems. Each system might differ more or less from this standard set of rules but, nevertheless, be considerable as a private property system. What is, then, that makes them all private property systems? It is, Waldron writes, the decision to solve problems of allocation of limited resources trough the creation of relationships of *ownership* between resources and individuals[331]. A relation that links resources, treated as separable objects[332], and individuals, threated as separable subjects, and such that the decision of an individual over the use of *his* object is accepted by the rest of society as conclusive[333]. The owner "solves" the problem of allocation because he is the one that rules over the use of the object (where *use* is to be broadly interpreted as including also non-use, destruction, allocation to other people, etc).

This description of the core of private property is not attached to any theory of justice. Therefore it does not provide any guarantee that owners will use resources in any rational or in any way consistent with an idea of justice. Nor there is any guarantee that each individual is *owner of something* or that resources are shared fairly within society. However, in practice, each private property system builds on certain perceptions of justice, more or less well implemented, and each of them provides restrictions to the set of rights of the owner, may it be for moralistic and paternalistic reasons[334] or for efficiency and distributive justice matters[335], or for environmental reasons[336].

Indigenous property

IPLCs legal and cultural systems are very diverse, however, it is possible to affirm that many IPLCs manage lands and resources through a system of rules that can be

[331] (Waldron, 1988, p. 39).
[332] (Waldron, 1988, p. 38).
[333] (Waldron, 1988, p. 52).
[334] (Calabresi & Melamed, 1972).
[335] (Rose-Ackerman, 1985).
[336] (Rodgers, 2009).

described as a system of communal property[337], or *commons*, in which property is not «centred on an individual but rather on the group and its community»[338]. Commons are defined by Donald Nonini as «those assemblages and ensembles of resources that human beings hold in common or in trust to use on behalf of themselves, other human beings, and past and future generations, and which are essential to their biological, cultural and social reproduction»[339]. Enrico Diciotti proposes to look at common goods as those goods that the members of a group have equal freedom to use, and no single member has exclusory rights over them, nor can acquire them[340]. The definition of commons system is not an easy task, mostly because the term *commons* is used to refer to different arrangements and goods[341]. The type of commons that interests us here, are the commons described by Ostrom that Mauro Barberis qualifies as *neo-ecologist*[342]: institutional arrangements of autonomous small communities - between fifty and fifteen thousands members - that have successfully managed limited natural resources.

Commons systems for the management of natural resources have historically been dismantled along two contradictory ways, both turned out to be detrimental for indigenous peoples. The first dates back to the colonization of North America and Australia and was used to deny that indigenous peoples had any property rights over their lands[343]. Since indigenous peoples held lands in commons, without a system of private property and since most of them did not practice agriculture, it was established that they owned no land[344]. «Indigenous peoples tend to live lightly on the land, and thus do not produce through their lifestyles the kind of evidence of dominion that European-rooted cultures are willing to recognize as worthy of legal protection»[345]. Their impact on lands and biodiversity was not visible: no fences, no farmed fields. Precisely because of their low impact on the environment, they were not recognized as having property rights over their lands and were evicted without consent or compensation.

Ironically, the call for conservation of nature acted in the same way for opposite reasons, grounding on the theory of the tragedy of the commons. In 1968 Garrett

[337] (Anaya & Williams, 2001; Posey & Dutfield, 1996, p. 60).
[338] (Jaksa, 2006, p. 186).
[339] (Nonini, 2007, p. 1).
[340] (Diciotti, 2013, p. 351).
[341] (Barberis, 2013, p. 381). In this article Barberis identifies three different *narratives* of common goods (benicomuni): *neo-middle age* narratives - whose commons describe little peasant villages of European mountains, locally solidary but closed to the outside world -; *neo-communist* narratives - whose commons are the goods essentials for the success of their political fights -; and *neo-ecologist* narratives - those that interest us here.
[342] (Barberis, 2013, pp. 386–387).
[343] (Benner, 2005).
[344] (Jaksa, 2006, p. 168).
[345] (Manus, 2005, p. 555).

Hardin, in his article *The Tragedy of the Commons*[346], searched for the human factors that influence the use of environmental resources and that can negatively effect their conservation. He reached two conclusions: the Earth cannot sustain – nurture and shelter – an indefinite growth of human population[347]; the allocation and use of resources must be regulated either by a centralized government or by a system of private property. Reasoning along with game theory, Hardin describes what he thinks would be the behaviour of a group of herdsmen sharing, in common, a grazing land. In the absence of any restriction, each herdsman will increase the number of his animals to increase his profits, his utility. Each extra animal reduces the amount of available grazing land for everybody, but each single herdsman, including the new owner, is negatively affected only very remotely. However, given that all herdsmen act in the same way, the land will soon be so overgrazed and destroyed and all herdsmen will lose all their animals. «Ruin is the destination towards which all men rush, each pursuing his own best interest in a society that believes in the freedom of the commons»[348].

The eviction of many indigenous and local communities from their lands, in order to preserve local biodiversity has been backed up by the Hardin's theory[349]. IPLCs, associated to use of resources in commons, were perceived as threats to ecosystems because they were bound to use them unsustainably[350]. As Hardin suggested, the alternative solutions that were proposed consisted in the transformation of the commons in private property or State controlled systems[351]: privately owned conserved areas or governmental protected areas.

In the late 1980s, the studies of Ostrom challenged the *tragedy of the commons*[352] and proved that community's commons, under certain conditions[353], can be more effective in sustainable long-term use of natural resources than State-controlled or private property systems[354]. Commons are not described as *always-successful* arrangements[355], but neither as less successful than private property or State-

[346] (Hardin, 1968).
[347] The understanding that the increase of human population above certain limits may cause the destruction of Earth's ecosystems and, ultimately, of human kind itself, was a major contribution Hardin gave to theories of sustainable development. While it raises many ethical issues, such as for example the respect of certain basics freedoms, it is hard to deny it on the ground of scientific assumptions and data.
[348] (Hardin, 1968).
[349] (Bavikatte, 2012, p. 21).
[350] (Becker & Ostrom, 1995, p. 115).
[351] (Bavikatte, 2014, p. 10).
[352] (Becker & Ostrom, 1995; Ostrom, 1990).
[353] Effective governance of commons is not easy to achieve and is not achieved by all IPLCs, but there are many examples of successful management (Nonini, 2007, p. 1).
[354] (Ostrom, 1990, p. 1).
[355] (Nonini, 2007, p. 2).

controlled arrangements[356]. Moreover, as Ostrom notes, depending on the physical and social environment, a shift from commons-like property systems to State-controlled arrangements may have disastrous effects[357]. It is important to notice that the commons-like system that Ostrom describes is not a rule-less system without any institution. It is not a state of freedom and lack of coercion, as the herdsmen system pictured by Hardin. Ostrom's system of commons is a system that presents a combination of: clearly defined boundaries; rules that are adapted to local conditions and that allocate resources to users; participation of most resource-users in decision-making processes; effective control of compliance to rules by subjects accountable to the users; graduated sanctions for users that do not comply with rules; local and low-cost conflict-resolutions mechanisms; self-determination of users (their rights to create and manage their institutional is not threatened by external authorities) and long-term tenure rights over the resources[358].

IPLC property systems, when they have a certain level of governmental self-determination and long-term tenure rights over their lands and resources, resemble Ostrom commons – indeed she was inspired by the study on indigenous peoples and local communities in her research. IPLC commons are not unregulated like Hardin's natural resources, they are ruled by customary laws that grant rights and impose obligations to members; they have more or less structured institutional systems, which coordinate behaviours and have means of monitoring compliance with rules; and they are usually "small enough" to make each person's action noticeable to the others and consequently limit the free-rider[359] problem. Hence, when they have certain fundamental rights to self-determination and over lands and resources they can be in the position to actually promote the conservation of the local environment.

3.2.3. The Noble Savage Myth

Assumptions about the correlation of indigenous peoples and biological diversity immediately bring to mind the famous *noble savage* myth, and in particular that of the *ecologically noble savage*, that describes indigenous peoples as pacific friends of nature, too good, and too *primitive*, to harm the environment.

[356] (Bavikatte, 2014, p. 10).
[357] (Ostrom, 1990, p. 23). Ostrom brings the example of the nationalization of forests previously managed by local villages in commons-like arrangements and provides literature for many similar examples.
[358] (Becker & Ostrom, 1995, p. 119).
[359] A free-rider is a person that benefits from a good or service without bearing the costs of its creation and conservation (Olson, 1965).

> «Some of the indigenous peoples and the anthropologists [...] insist that past indigenous peoples were (and modern ones still are) gentle and ecologically wise stewards of their environments, intimately knew and respected Nature, innocently lived in a virtual Garden of Eden, and could never have done all those bad things. [...] Only those evil modern First World inhabitants are ignorant of Nature, don't respect the environment, and destroy it»[360].

Considering the popularity of the *noble savage* myth, it is important to clarify its meaning and scope and, most importantly, to state distance from it.

The term *noble savage* - commonly understood as «a mythic personification of natural goodness by a romantic glorification of savage life»[361] - was first used by Marc Lescarbot in his book *Histoire de la Nouvelle-France*, in 1609[362]. The term is usually attributed to Jean Jacques Rousseau and in particular to his book *Discours sur l'origine de l'inégalité parmi les hommes*, 1745, where Rousseau describes an archetype of man «living in a "pure state of nature"»[363]. Interestingly, Rousseau never actually uses the term *bon sauvage*[364] and his reconstruction of human evolution is actually more complex. He describes an original era when people lived isolated and in peace with each other and with nature: this state of things was due to a lack of ability to conceive to take more[365]. The human being he portrays has such modest needs and desires that it takes very little to satisfy him[366]. He lives alone and idles, thinks little and sleeps most of the time[367]. He may be particularly *harmless* in environmental terms, but is also very culturally and socially *savage*. It is, for Rousseau, «the happiest and most stable of epochs»[368], however, this animal-like state does not reflect the state of indigenous peoples discovered by his contemporaneous in the New World and in Southern Africa. The latter, he thinks, are one step forward in *evolution*, they are not completely natural: they are reunited in groups, have discovered the first forms of property, and have developed basic languages and the first rules of society[369]. They have already encountered vanity, contempt, shame and envy and can be cruel and

[360] (Diamond, 2005, p. 9). Diamond is very critic of the myth of the noble savage and in particular of its use in today's discourse on the recognition of indigenous peoples' rights. The cited part of his book, is an ironic, but accurate, description of those that fall in the ideological trap of the myth.
[361] (Ellingson, 2001, p. 1).
[362] (Ellingson, 2001, p. XV).
[363] (Ellingson, 2001, p. 1).
[364] (Ellingson, 2001, p. 81).
[365] (Rousseau, 2008, p. 23).
[366] (Rousseau, 2008, p. 18).
[367] (Rousseau, 2008, p. 16).
[368] (Rousseau, 2008, p. 33).
[369] (Ellingson, 2001, p. 33).

bloody[370]. So, he writes «the goodness, which was suitable in the pure state of nature, was no longer proper in the new-born state of society»[371].

Whether or not Rousseau meant to describe indigenous peoples as *noble savages*, two hundred years later, John Crawfurd, the president of the Ethnological Society of London, addressed the "eccentric philosopher" inviting him to spend a week's residence with the recently "discovered" inhabitants of the Terra del Fuego «to reach a saner conclusion»[372], meaning: to understand that *savages* are in no way *noble*. Crawfurd, in his article *On the Conditions which Favour, Retard or Obstruct the Early Civilization of Man*, used the term *noble savage* with a clear racist, anti-human rights intent. In the article, where *race* is considered the first and most significant factor for the *civilization* of a people, the two parts of the term are disentangled and *savage* is deprived of any form of *nobility*:

> «I cannot [...] conceive anything noble in the poor naked, crouching creature, trembling with cold and starving from hunger»[373].

Neither Rousseau's nor Crawfurd's *savage* resembles what today we would describe as an indigenous person. Also if, with a very big effort, deprived of its racist side[374], the term *savage* means brutal, ignorant, ferocious, backwards[375].

3.2.4. The Ideological Trap

Today the myth of the *noble* savage is still debated by scholars of different fields – anthropologists, conservationists, ethnobiologists, geographers. In 1990, the publication by the conservationist Kent Redford, titled *The Ecologically Noble*

[370] (Rousseau, 2008, pp. 32–33).
[371] (Rousseau, 2008, p. 33).
[372] (Crawfurd, 1861).
[373] (Crawfurd, 1861). The intent of Crawfurd's work is so described by Ellingson (2001, p. 388): «in the language of 1990s technology, Crawfurd succeeded in creating a discursive and conceptual virus, one that insinuates itself into our thought and words and scrambles our data and programs, ultimately corrupting our work and impairing our access to the most valuable part of the anthropological heritage: the critical awareness of our shared humanity that should have been anthropology's first and greatest gift to ourselves and the peoples we study». In the book, Elligson actually dismisses the idea of the very existence of the myth itself. After showing that Rousseau did not coin nor ever used the term, he demonstrates how the real myth is the existence of the myth of the *noble savage*, created with racist purposes by Crawfurd.
[374] A century and a half later the myth continues to be used as a racist, anti-indigenous rights tool. For example, S. Grande (1999) shows how the myth has been used in Northern America to justify the eradication or, to the best, assimilation of American Indians during the colonization period and how today it is part of the rhetorical construction used to keep them confined at the margins of society.
[375] (Ellingson, 2001, p. 355).

Savage, granted the myth a new and slightly different *resurrection*[376]. The *nobleness* was modernized and described as *ecological*, and it was, as such, criticized. In his brief but incisive article, Redford argues that «there is no cultural barrier to the Indians' adoption of means to "improve" their lives (i.e., make them more like Western lives), even if the long-term sustainability of the resource base is threatened». Redford underlines that indigenous peoples (and local communities) have the same capacities, desires, and needs as *western* people. Therefore, he argues, to assume that «when confronted with market pressures, higher population densities, and increased sedentism most indigenous peoples will maintain the integrity of their traditional methods», is to fall into the "ideological trap" of the *ecologically* noble savage myth. The myth assumes that *all* indigenous peoples have had - and have preserved - sustainable lifestyles, just as if such peoples had some inherent features that define their sustainable relationship with the environment and that run so deeply as to be independent from external conditions (an idea that somehow links such nobility as deep as to reach hypothetical *savage genes* and *indigenous races*[377]). The mythological nature of assumptions about indigenous eco-responsibility is further emphasised by the fact that recent archaeological discoveries have revealed that in many cases indigenous societies - before the arrival of European colonialists - have contributed to the destruction of habitats and the extinction of species. Even more problematically, once sustainable practices can become unsustainable when changes such as population density, abundance of land and involvement in a market economy occur[378]. The noble savage myth then fails to reflect important realities and nuances fundamental to the achievement of sustainability in changing conditions because of its too simplistic representation of reality[379].

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[376] (Ellingson, 2001, p. 344).

[377] In the present work it would be neither adequate nor relevant to dwell on the critics of racism. But it is important to underline that the theory here embraced on the topic is that of the geneticists Luigi Cavalli-Sforza and Guido Barbujani that sustain that the existence of human races is scientifically proved to be false. See: (Barbujani, 2006; Cavalli-Sforza, Menozzi, & Piazza, 1994).

[378] For instance, if the customary use of certain species cannot be sustainable anymore because their populations has decreased due to external factors; or because the size of available lands has been reduced and traditional agricultural techniques (like the *slash-and-burn:* an agricultural technique, typical of the tropical rain forest, that involves the burning of slots of lands to clear them for fields. After certain years of use the plot is left to rest and cultivations are moved to another piece of land) do not allow, anymore, the cyclic regeneration of soil, or when the internal social structures and rules that used to control access to resources are loss. Many indigenous and local communities have endeavoured profound changes and today they are living a state of *transition (*(Diamond, 2012, p. 6, in note), rather than *tradition*, because they have already had their traditional ways of life more or less impaired by the restriction, or disappearance, of their lands, by the destruction of local biodiversity and by the limitation of their right to self-determination caused by activities such as logging, mining, plantations, dams, educational policies, biopiracy, and protected areas (Forest People Programme, 2011).

[379] (Claus et al., 2010, p. 269).

Even though the present research springs from the idea of indigenous peoples living sustainably, it rests on the understanding that there is no benefit to romanticize them – even those that still live sustainably[380]. To point out the dangers of the noble savage myth is not to claim that IPLCs do not have cultural, spiritual and legal systems that guide their relationships with the environment towards sustainable paths. It is simply to acknowledge that IPLCs can and do - and sometimes for sustainability-inspired reasons - change their practices and/or find that their practices become unsustainable because external conditions have changed.

[380] (Posey, 1999b, p. 7).

Part 4. Biocultural Rights

Chapter 4.1. *Definition, Foundations and Content*

4.1.1. Definition

The term *biocultural rights* is not in common usage[381] and, although interest on the topic is rapidly growing[382], literature is limited as yet. Before 2009 the term biocultural right is hardly found in the literature. In 2009 Ramirez and Ulaner[383] used the term to describe the rights of indigenous peoples over traditional knowledge associated with natural resources, but made no reference to a broader set of group rights concerned with the conservation of the environment.

In 2010, Bavikatte, drawing on the wording of the Convention on Biological Diversity, the Nagoya Protocol on Access and Benefit Sharing, and other environment-related UN treaties and declarations[384], argues that biocultural rights are a new set of third-generation rights in the process of being recognised[385]. He traces their origin in the convergence of the post-development movement, the commons movement and the movement for IPLC rights[386] and charts their development in «multilateral environmental agreements, domestic legislation, case law, shifts in development discourse and the struggles of communities»[387]. A range of environment-focused documents, he explains, increasingly recognise the relevance of IPLCs' traditional knowledge, practices and ways of life for the conservation of the environment[388] and call upon States to fulfil their responsibilities towards the environment by respecting the rights of peoples and communities to participate in the management of their territories and to preserve and promote their traditional knowledge[389]. Biocultural rights are defined as: «rights of indigenous peoples and local communities over all aspects of their ways

[381] (Bavikatte & Robinson, 2011, p. 49).
[382] Volume 6 of *Journal of Human Rights and the Environment*, to be published in March 2015, will be entirely dedicated to biocultural rights. An adaptation of this thesis will be published in that number.
[383] (Ramirez, 2007; Ulaner, 2008).
[384] Among which: the UN Convention to Combat Desertification, the UN Framework on Convention on Climate Change, the UN Forum on Forests, Food and Agriculture Organization and the International Union for Conservation of Nature (Bavikatte, 2014, pp. 16–20).
[385] (Bavikatte, 2014, p. 1). See 4.1.2.
[386] (Bavikatte, 2014, p. 16).
[387] (Bavikatte, 2014, p. 2).
[388] Among which, in particular: article 8j and 10c of the CBD, and Preamble of the Nagoya Protocol.
[389] Principle 22 of the Rio Declaration and Section 2.10 and 3.26 of Agenda 21; article 6.2, 7, 12.1 and 16 of the Nagoya Protocol.

of life that are relevant to the conservation and sustainable use of biodiversity»[390] and thus «denote all the rights required to secure the stewardship role of communities over their lands and waters»[391], and, Bavikatte argues, biocultural rights can provide a «people-led alternative to state-led technocratic solutions to the environmental crisis»[392]. Biocultural rights - according to this view - dwell on values, worldviews, practices, knowledge and institutions of indigenous peoples and local communities beneficial for the conservation of the environment. Bavikatte describes them as rights of communities «that have historically cared for their ecosystems [...] irrespective of whether or not they have a formal title to it»[393]. «The demand for biocultural rights», he underlines, «does not take as its point of departure the inherent right of a group or community to flourish, but rather [...] the ethic of stewardship: it is the ethic of stewardship and not the group *per se* that justifies the right»[394].

In biocultural rights discourse, the call of IPLCs for the recognition of rights over lands and natural resources is thus densely combined with the recognition of their role as "conservationists" of local ecosystems[395]. Both claims are relevant at the global level but are rooted at the local level. Since the 1970s indigenous peoples have engaged in an Earth-wide campaign for the recognition of their rights but, as their name reminds, it is a global campaign of local peoples. The global character of environmental issues stemmed long before, when States understood that pollution and other eco-disasters do not respect national boundaries. The two claims merged in one bigger stream when the environmental movement started to abandon the *fences and fines* approach[396] and indigenous peoples began to be considered more as partners than opponents.

Bavikatte and Robinson argue that even though the concept of biocultural rights recalls the right to self-determination, it focuses on the need to protect the environment by enhancing the link between communities and ecosystems[397]. They explain that biocultural rights build on two convergent claims[398]: one for the

[390] (Harry Jonas, Bavikatte, & Shrumm, 2010, p. 49). Jonas and Shrumm have later reviewed their position, which will be discussed below 4.3.2. For Jonas and Shrumm new position, see (Harry Jonas et al., 2013) and (Holly Jonas, Jonas, & Subramanian, 2013).
[391] (Bavikatte, 2014, p. 16).
[392] (Bavikatte, 2014, p. 18).
[393] (Bavikatte, 2014, p. 143).
[394] (Bavikatte, 2014, p. 142)
[395] (Bavikatte, 2014, p. 16 and 21).
[396] (Bavikatte & Robinson, 2011, p. 50).
[397] (Bavikatte & Robinson, 2011, p. 50).
[398] (Bavikatte & Robinson, 2011, p. 50).

recognition of rights of indigenous peoples and local communities and the other for the ending of the unsustainable and destructive use of biodiversity[399].

According to this construction, biocultural rights appear to be based on the following understandings:

- some indigenous peoples and local communities have maintained sustainable lifestyles relevant for the conservation of ecosystems and for the sustainable use of natural resources;

- these ways of life can survive and flourish only if such peoples and communities are secured certain group rights over lands, resources, culture, and customary law;

- the recognition of this set of group rights can thus enable and enhance the conservation of ecosystems and the sustainable use of natural resources[400].

It is these three understandings that converge in the theoretical construction of biocultural rights as a "basket" of rights (and, as will be discussed below, their inherent duties) promoting the two core interests forming its foundations:

1) the promotion and conservation of the cultural diversity and self-determination of indigenous peoples;

2) the conservation of the environment.

4.1.2. Emerging (Biocultural) Rights

In his book Bavikatte is clear when he writes that his aim is «to map a trajectory of biocultural rights as they emerge trough multilateral environmental agreements, domestic legislation, case law, shifts in the development discourse, and the struggles of communities»[401]. He does not pretend to be describing existing international law, neither in the form of treaties and conventions, nor in the form of custom. His voice is the voice of the doctrine, of a public law scholar, and his hope is that by telling and retelling the *story* of biocultural rights and through the elaboration of doctrines and theories elaborated by other scholars, who argue for or against their existence and that provide interpretations of relevant treaties and court decisions, biocultural rights will "come alive"[402].

[399] (Bavikatte & Robinson, 2011, p. 50).
[400] (Bavikatte & Robinson, 2011, p. 50).
[401] (Bavikatte, 2014, p. 3).
[402] (Bavikatte, 2014, p. 115).

Of course, Bavikatte's is not simply an idea stemming from his aspirations and hopes. The theoretical construct of biocultural rights is an imaginary wire that connects heterogeneous facts and words that have developed and are developing in the rhetoric, treaties, declarations and development projects concerning IPLCs and the conservation of the environment. Following is a small reconstruction of the elements that can be connected trough the biocultural rights' wire.

As we saw above[403], the increasing recognition of the link between indigenous peoples and the environment has influenced international political declarations and conventions and has lead to the recognition of specific provisions for indigenous peoples[404], understood to be essential for their survival as peoples, and to the inclusion of references to them in environment-focused documents. Such documents are nature-centred and propose indigenous' practices as instrumental for the conservation of the environment, and call States to recognize them certain rights, in particular in the management of natural resources and to the preservation of traditional knowledge. Among them we can see the Brundtland Report, *Our Common Future*, issued in 1987 by the UN World Commission on Environment and Development, which affirms that indigenous traditional knowledge and experience offer valuable lessons for the sustainable management of natural resources and ecosystems[405]. Accordingly, the 1992 Rio Declaration and Agenda 21 call States to fulfil their responsibility towards the environment respecting the right of indigenous peoples to participate in the management of their territories[406] and to preserve and promote their traditional knowledge[407]. They acknowledge that «indigenous people and their communities and other local communities have a vital role in environmental management and development because of their knowledge and traditional practices»[408]. In 1993, it entered into force the first international binding agreement that recognizes the role of indigenous peoples for conservation, the Convention on Biological Diversity. The CBD was welcomed as a great step forward by indigenous peoples movements because, besides affirming

[403] See 3.1.3.
[404] (Manus, 2005).
[405] (World Commission on Environment and Development, 1987, pt. 0.0.II.1.46 and II.4.III.3.74). The Brundtland Report also stated that: «the starting point for a just and humane policy for such groups is the recognition and protection of their traditional rights to land and the other resources that sustain their way of life - rights that may define in terms that do not fit into standard legal systems. These groups' own institutions to regulate rights and obligations are crucial for maintaining the harmony with nature and the environmental awareness characteristic of the traditional way of life» (World Commission on Environment and Development, 1987, pt. II.4.III.3.75).
[406] Principle 22 of the Rio Declaration and Section 2.10 and 3.26 of Agenda 21.
[407] Section 3 of Agenda 21.
[408] Principle 22 of Rio Declaration.

the close dependency of indigenous and local communities on biological resources[409], articles 8j and 10c also explicitly recognizes the importance of their knowledge, innovations and practices for the conservation of the environment[410]. The CBD calls States to protect and encourage the wider application of their customary use of biological resources[411] as a means to achieve its first goal, the conservation of biodiversity. In 2010, after extensive negotiations, the Parties to the CBD adopted the Nagoya Protocol on Access and Benefit Sharing. It entered into force in 2014 and its objective is the regulation of the access and use of genetic resources and traditional knowledge[412] as means to contribute to the conservation of biodiversity and the sustainable use of its components[413]. The Protocol reaffirms and develops what the CBD stated. The Protocol builds on the principle of sovereignty of States over the genetic resources found in their territories[414] but limits this sovereignty trough the recognition of specific rights to IPLCs. In the Preamble, States agreed to avow the interrelationship between genetic resources and IPLC traditional knowledge and their importance for environmental conservation and for the sustainable livelihood of these communities[415]. Article 5, 6 and 7 of the Protocols, in fact, require States to ensure that genetic resources and traditional knowledge of IPLCs are accessed with the prior informed consent of the communities and peoples of origin and that the benefits arising from their use is equally shared with them. Moreover, article 12 and 22 call Parties to implement their obligations under the Protocol taking in considerations, when dealing with the access and use of natural resources and traditional knowledge, indigenous and local communities' customary laws as well as their community protocols, which are documents in which they assert their

[409] CBD Preamble.
[410] CBD Art. 8j.
[411] CBD Art. 10c.
[412] Together with traditional lands and territories, traditional knowledge is considered the foundation of indigenous cultures and its conservation essential to their existence (United Nations Permanent Forum on Indigenous Issue, 2004). Tobin (2009) argues that indigenous rights to life, health, food, culture depend on the maintenance and development of such knowledge as a dynamic element that generates from the connection with the natural world and that is collectively held and shared among communities and peoples. Throughout the world, traditional knowledge is widely accessed for research with non commercial purposes and for the research on the development of new commercial products in pharmaceutical, cosmetic, food and other industries (Laird & Wynberg, 2008; Ten Kate & Laird, 1999). Many are the examples of acts of so called biopiracy that see international corporations accessing traditional knowledge associated with biological resources without the people/community' consent and remaining the only beneficiaries of sometimes enormous profits (Mgbeoji, 2006).
[413] Art. 1.
[414] Principle 2 of the Rio Declaration, article 3 of the CBD, Preamble of the Protocol.
[415] The Protocol is already influencing the making of national legislations in many developing countries and is thus contributing to the recognition of indigenous rights over traditional knowledge and, in some States, to the genetic resources found in their territories.

rights, goals and worldviews[416]. Bavikatte defines the Nagoya Protocol as a «monumental achievement of communities»[417] because it is the product of years of struggles and fight of indigenous peoples' representatives and international organizations such as the International Indigenous Forum on Biodiversity, in order to achieve an international recognition of their potential role for the conservation of the environment.

In 2004, under the umbrella of the Food and Agriculture Organization (FAO), it entered into force the Treaty on Plant Genetic Resources for Food and Agriculture (ITPGRFA), which recognizes the so called *farmers' rights*. Farmers' rights are defined by FAO as: «rights arising from the past, present and future contributions of farmers in conserving, improving and making available plant genetic resources, particularly those in center of origin/diversity. The purpose of these rights is stated to be ensuring full benefits to farmers and supporting the continuation of their contributions»[418]. Article 9 recognizes the contribution that indigenous peoples and local communities and, more broadly, farmers make towards the conservation and development of plant genetic resources[419]. It calls States to promote, trough yet unspecified national measures, the conservation of the traditional knowledge and practices of farmers, to share the benefits arising from the use of farmers' plant genetic resources and to involve them in relevant decision-making procedures. The article is of course very specific and concerns only plant genetic resources, but it builds on the understanding of the role of certain IPLCs for the conservation of certain natural resources and calls States, though timidly, to promote such conservation trough the recognition of rights to IPLCs.

Other environment-focused conventions, in particular the UN Convention on Combating Desertification and the UN Framework Convention on Climate Change[420], do not make, as yet, explicit reference to rights that may be framed as seeds of biocultural rights. However, they make reference to indigenous peoples

[416] For a case study and a more extensive explanation of what such protocols are, see below at Part 5 and section 5.3.
[417] (Bavikatte, 2014, p. 109).
[418] (Food and Agriculture Organization, 1989).
[419] (Pires de Carvalho, 2007).
[420] For example, recent talks about the UN Program on Reducing Emissions from Deforestation and forest Degradation (REDD) - a program developed within the UNFCCC - have evolved to include reference to the rights indigenous peoples and local communities (REDD+). REDD is a program aimed at reducing the emission of CO_2 gasses by compensating countries that decide not to grant logging licences over parts of their forests. Even though the UN-REDD Programme has committed to foster the respect of the rights of indigenous peoples and forest-dependent communities, REDD is still under development and many are still the problems related to its implementation.

and local communities as subjects of special consideration or as subjects to be included in development programs[421].

Bavikatte suggests looking also at the rulings of the Inter-American Court on Human Rights and the African Court as evidence of the emergence biocultural rights. In the above-mentioned[422] Mayagna (Sumo) Awas Tingni Community v. Nicaragua case, the Court ruled in favour of the Awas Tingni indigenous community on the ground of the special spiritual and cultural ties that link the community to their ancestral lands. The Court recognized communal property rights to the community against the decision of the Ministry of the Environment to licence the land to two logging companies[423]. Bavikatte argues that the Court could have recognized land rights to the community without emphasizing its spiritual and cultural relationship with it. Moreover, Bavikatte expresses doubts over the fact that the Court would have recognized property rights to the community had it had the intention to engage in for-profit logging or other detrimental activities[424]

In the Moiwana Village v. Suriname case[425], Bavikatte underlines[426] the fact that the same Court recognized communal land rights to a former-slave community on the ground of their profound all encompassing relationship to their lands, and on the ground of their dependency on the land for their spiritual and cultural identity[427]. Bavikatte calls their relationship with the land a relationship of stewardship, where the community acts as a wise environmentalist because it recognizes its material and spiritual dependency on the land[428]. Similarly, in the Saramaka People v. Suriname case[429], the Court, recalling the two previous rulings, recognized communal land and natural resources rights to the community on the ground of the special cultural and spiritual relationship its members have with the land[430]. Bavikatte argues that also this case is an example of the recognition of IPLC stewardship relationships with the environment[431].

The African Commission on Human and Peoples' Rights adopted in 2009 a decision, then approved by the African Union at its January 2010 meeting in Addis Ababa, on the case Endorois Welfare Council v. Kenya. The Endorois are an

[421] (Ziegler et al., 2008).
[422] See above at 1.3.1.
[423] Mayagna (Sumo) Awas Tingni Community v. Nicaragua, par 149.
[424] (Bavikatte, 2014, p. 149).
[425] See above at 1.3.1.
[426] (Bavikatte, 2014, p. 152).
[427] Moiwana Village v. Suriname, par. 131.
[428] (Bavikatte, 2014, p. 152).
[429] See above at 1.3.1.
[430] Saramaka People v. Suriname, par. 90.
[431] (Bavikatte, 2014, p. 157).

indigenous people of about 60.000 members that have traditionally lived as pastoralist in the Rift Valley, in Kenya[432]. In 1978 the Kenyan government declared the area the Lake Bogoria Game Reserve and evicted the Endorois, without their consultation and promising compensation for their displacement. By 2003 only a very little monetary compensation had been received by a small part of the community members and all other promises, including the sharing of the revenues deriving from the management of the Reserve and the distribution of new lands, at not been met. On that year the Endorois presented their case at the African Commission that ruled in their favour. The Commission recognized the Endorois to be indigenous peoples that had communal property rights over their traditional lands because of their continued occupancy (until the forceful eviction) and because of their special religious and cultural relationship with the lands[433]. The Court recognized that the relationship with the lands and their natural resources was paramount for their survival and identity and declared that only very exceptional public interests[434] could justify their eviction with compensation. And, most interestingly, the Commission declared that in this case the creation of a conservation area was a non-reasonable justification because: «the Endorois – as the ancestral guardians of that land - are best equipped to maintain its delicate ecosystems [...and] the Endorois are prepared to continue the conservation work begun by the Government»[435]. As Bavikatte points out, the type of relationship that the Commission has noted between the Endorois and their lands is a relationship that «includes the duty of stewardship»[436]. The Commission stressed that «validation of rights is not automatically afforded to [...] pre-invasion and pre-colonial claims»[437]. The indigenous peoples must also «have an unambiguous relationship to a distinct territory and that all attempts to define [them] recognise the linkages between people, their land, and culture»[438].

In each of these cases, Bavikatte argues, the Courts did not simply recognize group rights to lands on the ground of historical occupancy. They also provided «extensive treatment [...] of the cultural, spiritual and, in effect "all encompassing relationships" between peoples and territories»[439]. And, he stresses, had there been evidence of ecologically destructive activities by the communities, the courts

[432] (Bavikatte, 2014, p. 160).
[433] Centre for Minority Rights Development (Kenya) and Minority Rights Group (on behalf of Endorois Welfare Council) v. Kenya, African Commission on Human and Peoples' Rights, No. 276 (2003), par. 243-244.
[434] Endorois Welfare Council v. Kenya, par. 212.
[435] Endorois Welfare Council v. Kenya, par. 235.
[436] (Bavikatte, 2014, p. 164).
[437] Endorois Welfare Council v. Kenya, par. 154.
[438] Endorois Welfare Council v. Kenya, par. 154.
[439] (Bavikatte, 2014, p. 167).

would have more likely recognized them rights to compensation for their evictions, rather than rights over the lands and natural resources[440].

International treaties, States' declarations and Court decisions are accompanied by IPLC declarations on environmental protection, access and benefit sharing, climate change, extractive industries, protected areas, and sacred natural sites, which emphasize the role of indigenous peoples as custodians of the environment. Among them the 1997 Heart of Peoples Declaration, the 2012 Rio+20 Indigenous Peoples International Declaration on Self-determination and Sustainable Development, the 1993 Maataatua Declaration on the Cultural and Intellectual Property Rights of Indigenous Peoples, the 2010 Declaration of Solidarity of the International Conference on Indigenous Peoples' Rights, Alternatives and Solutions to the Climate Crisis and the 2008 Statement of Custodians of Sacred Natural Sites and Territories.

None of these treaties, declarations and court decisions uses the term biocultural rights, but the content and form of the rights or interests they recognize may be interpreted as matching with the spirit or the definition of biocultural rights. However, I think that further research and time is needed to understand whether these words and facts may be considered to be signs of the emergence of biocultural rights.

4.1.3. Conditions for Being and Remaining Stewards of the Environment

Biocultural rights discourse is grounded on the assumption, discussed above[441], that there exist IPLCs that have maintained environmentally sustainable ways of life. Bavikatte and Robinson have argued that these «"way[s] of life" relevant for conservation and sustainable use of biological diversity [are] linked to secure land tenure, use rights and rights to culture, knowledge and practices»[442]. An analysis of the literature reveals certain conditions that seem indispensable for a people or community to be free to maintain its traditional way of life and its role as stewards of the environment.

Traditional institutions (formal and informal) need to be recognised as legitimate by the members of the community they exist for[443]. Rebecca Tsosie argues that in order to exercise their authority, traditional institutions need to be combined with

[440] (Bavikatte, 2014, p. 168).
[441] See above Chapter 3.2.
[442] (Bavikatte & Robinson, 2011, p. 50).
[443] (Tsosie, 1996, p. 294).

a certain degree of social cohesion[444], such that the members of the group share a coherent and common understanding and an acceptance of traditional norms and values[445] and are «embedded in the social context»[446]. A lack of social cohesion, she suggests, may make traditional mechanisms such as ostracism, shame, fear of bad luck, or positive incentives ineffective for guiding the behaviour of community members[447]. Traditional local institutions are, moreover, the primary instrument giving voice and application to the needs, concerns and interest of the local people and for regulating the use of lands and natural resources[448]. Local institutions are therefore fundamental to the maintenance of traditional knowledge and values, customary laws and to the intergenerational transmission of language and culture, thus centrally contributing to the enhancement of «the conservation potential of traditional cultural and spiritual beliefs and practices related to the local environment»[449].

A strong cultural identity confers a «sense of pride»[450] through the identification with a certain heritage. When it is strong and flourishing, cultural identity can foster the conservation of cultural practices, knowledge and languages that regulate and maintain the sustainable use of lands and natural resources[451]. Local traditional languages are one of the major elements of cultural identity and are one of the means to communicate and pass on, generation after generation, knowledge of local biodiversity, traditional resource use and management practices[452].

The «recognition and preservation of cultural identity, lifestyles, and livelihoods»[453] is also contingent «on the protection and control of traditional land bases and associated natural resources»[454]. Relationship with native land is «central to their collective identity and wellbeing»[455]. If «displaced from the land which provides both physical and spiritual sustenance, native communities are hopelessly vulnerable» and their «existence is deprived of its coherence and distinctiveness»[456]. The intensive imbrication between land and identity has particularly telling implications for the relationship between governmental policy and laws and local practices, and precisely because the imposition of governmental

[444] (Tsosie, 1996, p. 289).
[445] (Tsosie, 1996, p. 294).
[446] (Tsosie, 1996, p. 289).
[447] (Tsosie, 1996, p. 289).
[448] (Maffi, 2014, p. 9).
[449] (Maffi, 2014, p. 9).
[450] (Maffi, 2014, p. 10).
[451] (Maffi, 2014, p. 10).
[452] (Maffi, 2014, p. 7).
[453] (Schmidt & Peterson, 2009, p. 1459).
[454] (Schmidt & Peterson, 2009, p. 1459; Tsosie, 1996, p. 330).
[455] (Johnston, 1995, p. 193).
[456] (Johnston, 1995, p. 194).

policies and laws can undermine the preservation of traditional institutions, certain degrees of normative autonomy and self-determination are needed to preserve traditional institutions, rules and commons-like property systems[457] in order «to ensure that not only their lands and resources but also their ways of life and livelihoods, institutions and identities, values and knowledge systems, cultural traditions and languages are protected»[458]. Accordingly, «most major international conservation organizations [now] recognise that indigenous peoples' self-determination is critical for biodiversity conservation»[459] and that «detrimental impacts on biodiversity conservation [...] occur when dominant society fails to allow indigenous groups' self-determination and control over their natural resources»[460].

4.1.4. Which Rights Best Preserve the Conditions for Stewardship?

How can these conditions for stewardship be preserved? This is an important question, to which biocultural rights are - in a sense - a response. The rights that may be considered to be part of the biocultural rights basket are precisely those needed to safeguard the conditions for «secur[ing] the stewardship role»[461] of IPLCs. This section accordingly offers a translation into human rights-terms of the main conditions set out above in order to identify which sets of rights might plausibly emerge from a recognition of biocultural rights in international or national law and to suggest what fighting for the recognition of biocultural rights would entail.

Accordingly, the basket of biocultural rights is not conceptualised as a static set of pre-selected rights. It is a basket to be filled with the «rights required by communities to care for their lands and resources»[462] and to protect their ways of life. Since each community or people will have different needs in terms of rights to maintain its way of life, the biocultural rights basket will necessarily vary from one context to another in response to local circumstance and nuances. Such differences can be expected to exist in relation to communities' and peoples' traditions, to their relationship with local ecosystems and to their level of interaction or conflict with external actors.

[457] (Tsosie, 1996, p. 293).
[458] (Maffi, 2014, p. 9).
[459] (Schmidt & Peterson, 2009, p. 1459).
[460] (Schmidt & Peterson, 2009, p. 1464).
[461] (Bavikatte, 2014, p. 16).
[462] (Bavikatte, 2014, p. 235).

The following categories of rights are those capable of being recognised as biocultural rights if the dual justificatory foundations of Bavikatte's formulation is taken seriously. The aim here is to identify the categories of rights that can be understood - with conceptual consistency - to be biocultural rights on the basis of Bavikatte's formulation - and in particular with reference to his overriding emphasis on environmental stewardship.

1) *Rights to land and natural resources*. These include: the right to access and use traditional lands of a community/people or of a sufficient portion of them; special access to sacred natural sites; access and use over biotic (plants, animals, bacteria and fungi) and a-biotic (water, soil, air, rocks) resources present in the land[463]; protection from external threats to the environment such as pollution, invasive species and climate change. These rights are self-evidently fundamental to any stewardship role placed upon IPLCs.

2) *Rights to self-determination*. Self-determination should be understood to be the overarching right in the biocultural rights basket, the prerequisite for the realisation of all other rights[464]. As Anaya explains, self-determination of IPLCs entails «meaningful self-government through political institutions that reflect their specific cultural patterns and that permit them to be genuinely associated with all decisions affecting them on a continuous basis»[465]; the possibility of each people and community to regulate its internal matters through the use of its traditional legal institutions and rules[466]; and the limitation of impositions of decisions taken by external actors on matters that influence the community. As for example: construction of infrastructures (e.g. dams and roads), exploitation of resources by extractive industries or creation of protected areas. Since both aspects of this formulation are «considered instrumental to [IPLC] capacities to control the development of their distinctive cultures, including their use of lands and recourses»[467], both are therefore essential for their ability to maintain their stewardship role for the environment.

3) *Rights to cultural identity*. This refers to those rights and conditions necessary to safeguard the integrity of the values and worldviews, practices and knowledge of IPLCs. These rights include the right to speak traditional languages, to profess

[463] Rights over the underground resources of a land are, in many States, kept under property of the State. In terms of biocultural rights, a community/people may not need to be secured rights over them, but only if appropriate protection is provided against their exploitation without prior informed consent.
[464] (Xanthaki, 2007, p. 131).
[465] (Anaya, 1996, p. 112).
[466] (Anaya, 1996, p. 112).
[467] (Anaya, 1996, p. 110).

religious and spiritual practices, to the education of children, and to apply, preserve and teach traditional knowledge. In other words, the broader right to maintain cultural, social and religious specificities without experiencing discrimination by the State and by the rest of society. Given the intimacy between traditional worldviews, practices and cultural identity with IPLC environmental stewardship, these rights are also fundamental to the nature of biocultural rights.

Besides these substantive rights, procedural rights (such as the right to access to justice, the right to prior informed consent and the right to the application of a precautionary approach) seem to be essential elements in the basket of biocultural rights because they are the tools that IPLCs will need in order to prevent or to halt violations of biocultural rights (always intrinsically related to the prevention of environmental destruction) and are therefore essential for making biocultural rights enforceable, rather than merely paper, rights[468].

4.1.5. Biocultural Rights Predecessor: Traditional Resource Rights

The rights listed so far are restricted to those relevant for the conservation of the environment. Their focus on the environment brings biocultural rights beyond their precursors: Traditional Resource Rights (TRRs)[469]. A few words on TRRs are important to further illustrate the distinctiveness of biocultural rights.

TRRs are baskets, or as Posey calls them *bundles*[470], of rights conceived by Posey and Graham Dutfield in the 1990s[471]. TRRs build on the idea that indigenous peoples and local communities[472] live in a sacred balance[473] with the environment and that, in order to survive and flourish, such peoples and communities need the recognition not only of basic human rights, but also of rights over lands and resources, rights to self-determination and rights over their cultural and spiritual knowledge and values[474].

Posey was inspired to develop the idea of TRRs by the increasing need of IPLCs to find alternative economic resources to survive, to develop and to demand the

[468] The expression *paper rights* - diritti di carta - is used by Guastini in (1994, p. 168).
[469] The following reconstruction of Posey's ideas is based on an extensive study of many of his writings and is inspired by the article by (Harry Jonas & Shrumm, 2012).
[470] (Posey, 1996).
[471] (Posey, 1996); (Posey, 1999a); (Posey, 1990); (Posey & Dutfield, 1996); (Posey, 1998).
[472] Posey in his publications refers interchangeably to the following terms: *indigenous peoples, local communities* and *traditional societies* (Posey, 1996, 1999b); *native peoples*, *indigenous societies* and *indigenous groups* (Posey, 1990); *indigenous and traditional peoples* (Posey & Dutfield, 1996); *local communities*, *indigenous and traditional peoples* (Posey, 1998). I will here continue to refer to IPLCs for consistency with the rest of the paper.
[473] (Posey, 2002, p. 3).
[474] (Posey, 1999b).

respect of their rights *vis à vis* national governments[475]. Crucially, Posey noted that IPLCs «must revert to ecological destruction, associated with atrophy of their own knowledge systems, in order to acquire the economic power they need to survive»[476]. The only means of IPLC economic income, Posey writes, «require the destruction of tropical forests in order to be obtained»[477]. In order to provide alternative sources of income for IPLCs, Posey calls for the recognition of IPLCs' rights over traditional knowledge. He writes that bio-prospecting - the use of traditional knowledge to discover, develop and improve pharmaceutical, cosmetic, alimentary, and other products - could support IPLCs' lives, survival and development in non-destructive ways while, at the same time, promoting the conservation of their precious knowledge[478].

Posey then expanded the idea of TRRs beyond the protection of traditional knowledge to integrate otherwise diverse provisions in order to create bundles of rights to address the economic needs, as well as the human rights and environmental concerns, of IPLCs[479]. In particular, Posey focused on the importance of promoting IPLCs' rights to self-determination and cultural diversity[480]. His bundle of TRRs over lands and resources includes respect for cultural differences and traditional institutions, prior informed consent and veto power over projects that may affect IPLCs[481]. He also developed a political and legal project[482] aimed at upholding IPLCs' rights through a process of *identification*, *harmonisation* and *equitisation*[483] of rights already expressed in existing binding and non-binding international documents from fields as different as biodiversity conservation, human rights, intellectual property rights, trade and development[484].

Posey's formulation of the idea of TRRs was a milestone in the development of the discourse about the rights of IPLCs in relation to the environment. The environment was presented as being an essential element for their survival and flourishing because of IPLCs' special relationship with it. Posey's work was emphatically directed towards upholding the interests of peoples and communities

[475] (Posey, 1990).
[476] (Posey, 1990, p. 14).
[477] (Posey, 1990, p. 14).
[478] (Posey, 1990).
[479] (Posey, 1995, pp. 5–6).
[480] (Posey & Dutfield, 1996, p. 78).
[481] (Posey, 1995, p. 4).
[482] (Harry Jonas et al., 2013, p. 82).
[483] (Harry Jonas & Shrumm, 2012).
[484] (Posey, 1996).

and, in order to achieve the realisation of this aim, he emphasised the need to recognise IPLC rights over the environment.

In the TRR formulation, the environment is conceptualised as being instrumental for the protection of IPLCs' interests. The foundational justification of TRRs is precisely the value of the self-determination of IPLCs and the preservation and development of their cultural diversity and identity. The protection of the environment is not, as in biocultural rights, one of the foundations of the right and hence one of the interest to be pursued for its own value. The protection of the environment is an instrumental value in TRRs, a need for the realisation of - and possibly also a consequence of - the interests of IPLCs justifying TRRs[485]. TRRs - in fact - place no restriction upon IPLCs' freedom to self-determine their destinies towards potentially unsustainable futures.

[485] (Posey & Dutfield, 1996, p. 78).

Chapter 4.2. *What of Duties?*

4.2.1. The First Foundation

Framing IPLC claims as biocultural rights claims brings with it important challenges - particularly those that hinge upon the duties invoked by the dual relationship between the interests lying at the heart of the discourse - that of IPLCs and that of environmental conservation. If these two interests start to be perceived as sufficiently important to reach the status of interests inviting protection by international or national law[486], a question then arises concerning which duties would exist in relation to each of these rights-protected interests. Duties are a fundamental element of the analysis of rights, without them rights remain mere pretences[487]. Accordingly, if we want to take biocultural rights seriously[488] we need to examine the relevant duties arising and identify the holders of such duties. In the case of the first foundation (the IPLC interest in the promotion and conservation of cultural diversity and identity) this matter is relatively more straightforward than the second (the conservation of the environment).

The promotion and conservation of the cultural diversity and self-determination of IPLCs is clearly a direct interest of IPLCs. It is relatively straightforward to construct an account of such rights, their importance and the likely set of duties attaching to them. IPLC self-determination and cultural diversity is an interest capable of being considered important enough to justify the emergence of the rights listed in section 4.1.4 above, and, consequently, the emergence of a corresponding set of duties for the realisation of such rights. IPLCs, as the rights-holders, are openly the subject to whom the duties would be due. The holders of corresponding duties (both to act and to refrain from acting) would most likely be States, private enterprises and the international community, since these are most likely to be able to affect the conservation of the cultural diversity and the self-determination of IPLCs. States, for example, would likely have the duty to recognise secure land and resource rights[489] and to respect local institutions,

[486] As seen above 2.2.2, in the Interest Theory, a right arises when a certain treatment or good is considered so important for the needs, interests or desires of the members of a certain group that it should be secured to them and it would be legally and/or morally wrong to deny that good or treatment (Celano, 2001, pp. 37–38). See also (MacCormick, 1976, p. 75).
[487] (O'Neill, 2004, p. 97).
[488] A rephrase of the title of the book by Ronald Dworkin, *Taking Rights Seriously*.
[489] Secure land and resource rights means that the title of the community or people cannot be over-ridden by exploitative concessions or other permits issued by the State (Holly Jonas et al., 2013, p. 219).

decision-making processes, traditional practices and worldviews by refraining from imposing inappropriate levels of State interference, from limiting the use of local languages, and from forcing development, educational or other policies. Private enterprises would likely have the duty to respect the wills of IPLCs on their recognised lands and to act only after prior informed consent has been sought, and to respect IPLCs' right to refuse projects and other interventions. The international community would also likely have a duty to refrain from imposing conservation or development projects, such as protected areas, unless they are discussed, processed and accepted by local peoples and communities. Under these circumstances, IPLCs would straightforwardly be claimants[490] for the respect of their self-determination and cultural diversity rights *vis à vis* national States and their institutions; private enterprises and the international community. At times, however, other interested parties might well speak on IPLCs' behalf, as might be the case with non-governmental organisations or community-based organisations, but such parties - and their representations - would always need to be legitimated by IPCLs.

4.2.2. The Second Foundation

The second foundation, the protection of the environment, raises more complex issues.

IPLCs directly benefit from the protection of their environment because they depend on lands and natural resources for their survival and flourishing and for the conservation and development of their cultural diversity. If the emergence of biocultural rights is postulated, this implies that such IPLC interests are considered important enough to justify placing a duty (to act and to refrain from acting) upon a range of actors to protect that environment. As in the previous case, States and private enterprises are still among the actors most likely to be able to affect the conservation of the environment and therefore to protect this specific interest of IPLCs. Such actors would be obligated not to harm the lands and natural resources of IPLCs and, under certain conditions, would also have the duty to support remedial actions in degraded areas where biological diversity has been depleted. IPLCs would also remain, in this context, claimants for the protection of the environment *vis à vis* States, private enterprises and, in certain cases, the international community.

[490] The claimants are, roughly speaking, those empowered to command the enforcement or waive of the duties connected to a right or to some other value.

It is important at this stage to note the implicit duality at the heart of biocultural rights theoretical construction. The rights to be included in the basket are needed for IPLCs to secure their stewardship of the environment, hence the interest of IPLCs in maintaining their relationship with their traditional lands and ways of life with relative security from governmental interference is clearly in view. Importantly, it is also the case that the rights chosen are those needed to protect the environment (through the maintenance of the above-mentioned conditions[491]). Is the protection of the environment only an interest of IPLCs or is it a distinguishable concern? A closer look at their two foundations is needed because the relationship between the two foundations can be framed in two different ways.

Option 1

If protection of the environment were to be incorporated into biocultural rights as merely an IPLC interest - hence creating only the duties suggested in the previous section - it would not form a distinct second foundation of biocultural rights but would simply be a consequential object of their observance (as is the case with TRRs). The second foundation would be an appendix of foundation one. Bavikatte presents a visual representation of biocultural rights in the form of «a wheel with the circumference being the objective of conservation and sustainable use, the central hub being the ethic of stewardship and the spokes being the different biocultural rights that communities require to protect their ways of life»[492] pulling together «seemingly disparate rights in order to achieve the objective of conservation»[493]. The rights in the basket are the spokes that, by protecting certain interests of IPLCs, protect the central hub. The central hub is the ethic of stewardship that, overall, leads to IPLCs conserving of the environment. From this visual representation, it seems necessary to treat the conservation of the environment as a real foundation, not a mere appendix of the first foundation relevant only as an interest of IPLCs. Bavikatte states it clearly, «biocultural rights base their claims on two foundations»[494].

Besides, if biocultural rights were described simply as a basket of specific rights of IPLCs over environmental assets, they might be sees a simple reproduction of the idea of TRRs, and probably, given the fact that TRRs are more widely known and carry the legacy of Posey, TRRs would prove a more influential tool for deployment in the rhetoric of human rights.

[491] See 4.1.3.
[492] (Bavikatte, 2014, p. 234).
[493] (Bavikatte, 2014, p. 234).
[494] (Bavikatte & Robinson, 2011, p. 50).

Option 2

The conservation of the environment is regarded as a self-standing interest. But, whose interest? Indeed, the general conservation of biodiversity, the preservation of the dynamic equilibrium of ecosystems, the safeguarding of the health of air, water and soil are the very goals of the environment-related documents from which biocultural rights, according to Bavikatte, seem to emerge[495]. These documents, more or less explicitly, aim at protecting the interest of humankind towards the conservation of the environment[496]. Therefore, it seems to be possible to picture biocultural rights as constructed upon two *real* foundations: one related to the interests of IPLCs and the other to what can be considered to be a more general interest of humankind in the conservation of the environment. IPLCs are accordingly in a direct stewardship relationship, not simply with their own lands and traditions, but with a broader context in which IPLCs are constituted as environmental stewards for a far broader human constituency - humankind itself. According to this interpretation, biocultural rights are located at a meeting point between two interests: that of IPLCs and that of humankind itself. Hence biocultural rights have two beneficiaries and, accordingly to the Interest Theory of rights[497], two holders: IPLCs and humankind.

This is a duality that lends to a certain complexity concerning the question of duties, which arise and change according to the way in which the holders of the interest are conceptualised. The duality of their foundation means that biocultural rights are limited to certain categories of right - and that such rights, moreover, have a distinctive character driven by the imposition of the stewardship duty emerging from the second foundation (the conservation of the environment for the whole of humanity). Therefore, rights that respond to the needs and interests of IPLCs but which have no connection to the maintenance of this broader role as conservationists, cannot be fully justified as biocultural rights because they would

[495] See Preambles and Articles 1 of CBD, UN Convention to Combat Desertification, the UN Framework Convention on Climate Change, the Rio Declaration, the UN Forum on Forests, Food and Agriculture Organization and the International Union for Conservation of Nature.
[496] The CBD and is Nagoya Protocol, the Rio Declaration and Agenda 21, and the other international treaties and declarations cited above, see 4.1.2, are documents framed to address the interest of humankind, and of States, towards the conservation of the environment. Even if they recognize the intrinsic value of nature none of them makes reference to the rights of nature or of the environment. They adopt and anthropocentric approach «based on the view that environmental protection is primarily justified as a means of protecting humans, rather then an end in itself» (Sands et al., 2012, p. 776). The appropriateness of the choice between an anthropocentric and a cosmocentric approach towards conservation will not be discussed here. However, reflecting the approach most commonly chosen by the above mentioned instruments, it is not attempted an interpretation of biocultural rights as rights whose holder, together with IPLCs, is the environment itself. It is, however, considered to be a potentially interesting path of analysis, which will hopefully be explored in future research.
[497] See above at 2.2.2.

not build on both foundations proposed as their justification. Logically, in the light of the second foundation for biocultural rights, all the rights just enumerated can *only* be considered to be part of the basket of biocultural rights if they are relevant for the stewardship role of IPLCs. It is also impossible to select them *a priori*, with no reference to a specific people/community, because the basket of biocultural rights, as noted above, adapts from one case to another according to local circumstances and nuances. Accordingly, certain rights, such as the right to land and natural resources will be necessary for all communities and peoples performing a stewardship function, while others, such as the right to language, may not always be justifiable as biocultural rights in a given specific context because they may not always have relevance for the conservation of the environment.

4.2.3. Noble Savages or Ideological Trap?

It has been argued here that the conservation of the environment is also a general interest of humankind. As noted above, the rights included in the biocultural rights basket are precisely those needed to maintain the stewardship role of IPLCs towards the environment and, consequently, to protect, also, this general interest. In order to understand how this general interest is protected, a little further reflection on the stewardship role of IPLCs is helpful.

If we assume that IPLCs are and will remain sustainable once their biocultural rights are protected, then the implication is that the general interest in the conservation of the environment is more or less automatically protected once the rights of IPLCs are guaranteed and the only duties requiring operationalization - in such a situation - would be those of States, private enterprises and the international community. However, this is an implication based upon an unstable assumption. Simply providing rights to land and resources, rights to self-determination and rights to preserve distinct cultural identities to IPLCs does not imply - much less guarantee - that the interested community/people will maintain its sustainable lifestyle forever. IPLC practices, rules and beliefs may not always remain «in line with conservation goals»[498]. IPLCs might conceivably take decisions that lead to unsustainable consequences for their lands and resources, and they may also voluntarily decide to not act as stewards of the environment anymore.

It is accordingly essential that biocultural rights discourse should keep a distance from noble savage rhetoric and its ideological trap because otherwise the general

[498] (Berkes, 2004, p. 625).

interests of humankind in environmental preservation, one of biocultural rights protected interests, would not be really taken in consideration. Moreover, any such mythology would leave biocultural rights relatively weak in the face of data showing the potential threat that IPLCs themselves might pose to the environment. The logic of biocultural rights within Bavikatte's construction of them suggests that biocultural rights approaches either fall in the ideological trap of the noble savage, or need explicitly to incorporate (something Bavikatte does not seem to do) the possibility of the effect of IPLC traditions and practices ceasing to be sustainable. If IPLCs were entirely free to change sustainable lifestyles to suit IPLC needs, they would potentially disregard the second foundation of biocultural rights. The dual foundations of Bavikatte's formulation - especially when located against a stewardship duty on behalf of humankind - present a significant tension. This strategy brings significant challenges, some of which will now be introduced.

4.2.4. Challenges to Imposing a Duty

It is worth noting that such a conceptual foundation for the identification of rights is unusual within the human rights tradition. While the broad justificatory argument for biocultural rights laid out by Bavikatte shares a certain resonance with the Interest Theory of rights, and while biocultural rights are conceptualised as being an emergent category of group rights, they are distinctively linked to a general interest in the conservation of the environment elevated to the rank of a dual justificatory foundation beside (and in potential tension with - as will be discussed below) the interests of one of the rights-holders, IPLCs[499].

The logic of biocultural rights suggests that failure to observe a duty of sustainability might justify the withdrawal of the right itself or some other sort of punishment. An IPLC duty to be and to remain sustainable (through appropriate

[499] This formulation of a human right (or basket thereof) is unusual. Very often human rights are represented following the description provided by Dworkin (Dworkin, 1977). As seen above at 2.3.1, he describes human rights as *trumps* that win over considerations of general interests (Waldron, 1984, p. 17) because they protect human interests considered so fundamental as to *trump* over the interest of the community as a whole (Dworkin, 1984, p. 153). See above at 2.3.1. An example might make things clearer: the freedom of speech is commonly understood to be a human right. It protects the interest of every person to express her ideas and to communicate with other people. If freedom of speech were to be conditioned by a general interest in the growth of knowledge and culture (very important indeed) all sorts of problems would arise. Only those books, speeches, videos, etc. that provide a growth of knowledge would be publishable; someone (who?) would have to be entitled to decide what counts as a publication contributing to the *growth of knowledge*; some people would be excluded from the ambit of an accordingly conditioned freedom of speech because of their unconventional ideas, and so on. Conditioning the freedom of speech in this way seems unacceptable to all of us, because we perceive the interest of every person to be free to communicate as being more important than the general interest in the growth of knowledge. For a different position see (Leiter, 2014).

adaptation where necessary), in other words, seems minimally to imply the need for some kind of sanction if the State and the international community fulfil their respective duties and yet the IPLC fails to. However, this has problematic implications.

First, if we accept the idea of biocultural rights as inherently implying a duty of environmental conservation in the interests of humankind as a whole, then IPLCs would in effect be granted not just a basket of rights, but placed under a bundle of duties. Accordingly, the right to self-determination recognised as the overarching biocultural right is given an environmentally limited content. While in the light of relatively static assumptions about the nature of IPLCs such duties may seem to be in line with IPLCs own values and desires, in a world of changing contexts and complex pressures, such duties could become a burden upon IPLCs in direct conflict with their right to self-determination.

We could seek to meet this objection by emphasising that the duty to maintain a role as stewards of the environment does not necessitate static perpetuation of traditional ways of life. IPLCs can remain free to (self)determine their ways of life and to develop their culture, traditions and practices in line with their desires, wills and needs, to adapt to external inputs or evolve internal changes. They might, for example, abandon certain life practices and combine their traditions with techniques, knowledge and practices acquired from other societies. However, it would remain non-negotiable for them to do so while maintaining sustainability. Their right to self-determination would still therefore have a distinctive conceptual limit: the conservation of the environment.

What if it is the case of a community that guarantees good conservation of the local environment but not the *best* level of conservation possible? It could be the case, for example, that a conservation project, as a typical protected area, is more efficient. Are we to say that conservation of the environment has a limit in the respect and preservation of the self-determination and cultural identity of IPLCs? Or, would an increase in environmental conservation justify a decrease in the promotion of IPLC interests? As we saw above biocultural rights have two foundations and both have the same value and weight. None of the two may be disregarded if we are to remain within the boundaries of biocultural rights. The two interests would therefore have to be balanced[500], weighted against each other, in the attempt to protect at least partially both of them and to limit their realization to the less possible extent, because biocultural rights are neither purely

[500] See above at 2.3.2.

environmental rights nor purely IPLC rights. Indeed, balancing techniques lead, by definition, to the sacrifice of certain aspects of the interests but they are, nevertheless, necessary in any case of conflict between rights or, as in this case, among the interests justifying a right. In might be the case that some strategic considerations help us face in the balancing process: conservation without local communities involvement is more costly because of the need to find alternatives for the community; lack of community participation often hinders the long term sustainability of the conservation actions; more inputs from the outside are needed in terms of management and patrolling of the area; community members may become themselves a threat to the conservation of a land and resources from which they cannot benefit anymore[501]. However, it will always be a costly decision.

Secondly, if IPLCs were to be placed under such a duty, then one or more other subjects would need to be recognised as claimants of that duty. This raises a challenge. The subject for whom this duty exists is conceived of as "humankind", but humankind is not a definite entity. The most likely representatives of humankind are States and some elements of civil society (Non Governmental Organisations, Community Based Organizations, Foundations and the like) that might claim to represent the interests of humankind to the conservation of the environment (more or less sincerely). However, this solution also produces tensions because the putative claimants also correspond to the very kinds of actors that tend to violate the rights of IPLCs (States) or correspond to actors that currently have little or no power to require the enforcement of the duty. The involvement of the international community could provide a potential solution, perhaps building on the tools that might be offered by the Nagoya Protocol, but this point needs further development and research.

Thirdly, the question of sanctions raises as yet unresolved matters. What sanctions, besides the loss of their entitlement to biocultural rights, might IPLCs be subject to if they do not comply with their duty and what conception of a protected environment should be applied, in any case, to judge the actions of IPLCs? The first question needs further exploration of international and national instruments for the enforcement of duties and might vary from one country to another. The second question requires an extensive study of environmental conservation standards in combination with a study of different conceptions of the environment held by IPLCs and by international environmental law itself. It is fundamentally problematic to propose the imposition of duties and liabilities on

[501] See above at 3.1.2 and 3.1.3.

populations with variant concepts and conceptions of “the environment” and/or to have an uncritical approach to the value of environmental conservation. Biocultural rights discourse, in order to develop to full maturity, will need to develop responses to such important questions.

Chapter 4.3. *A* Sui Generis *Right: Customary Legal Systems and Strategic Considerations*

4.3.1. A S*ui Generis* Human Right

Given the overall picture that emerges from this analysis - in which biocultural rights materialise as "conditioned rights" that come with duties and that protect a general interest of humankind - biocultural rights appear to be *sui generis* as human rights. It does seem possible to try to overcome the tension identified above by suggesting that biocultural rights should be understood explicitly to operate as a *sui generis* legal concept attempting to create a bridge between human rights as commonly understood in western legal systems and IPLC legal (and more broadly, normative) practices[502].

As noted above[503], human rights have traditionally been conceived as predominantly individual rights: as a means to protect certain interests and needs of individual subjects, regardless of and against the general interest of the rest of the community/State[504]. Western legal systems can be considered to be rights-based[505], shaped around the aim of enhancing the interests of each subject because she or he is perceived as having a self-standing value superior to that of the group[506]. In contrast, IPLCs tend to «challenge the individualistic approach to human rights»[507]. IPLC legal approaches may, in fact, be described as duty-based[508] because they are shaped around the aim of safeguarding the existence of the group by ensuring the conformity of individual actions with a certain code of rules. IPLC normative practices rest upon the understanding that no member of a community can survive except within the community[509] and that the community itself cannot survive if detached from the surrounding natural world. Thus, the wellbeing of the community depends on the wellbeing of the environment. For such worldview systems, as Bavikatte argues, the environment is «so integrally intertwined with community life that it represents an entire way of being and knowing»[510] and «the defence of Nature for these communities represented a defence of a "cosmovision"

[502] Given the diversity and richness of IPLCs' legal systems, detailed research would be needed in order to provide a comprehensive picture of their traditions. I here attempt to identify some common features, conscious of the their very general and superficial nature.
[503] See section 2.3.3.
[504] (Waldron, 1984, p. 1).
[505] (Bobbio, 1988).
[506] (Bobbio, 1988).
[507] (Niezen, 2003, p. 133).
[508] (Bobbio, 1988).
[509] (Cullinan, 2002, p. 114; Masolo, 2004, p. 492).
[510] (Bavikatte, 2014, p. 6).

and of the very notions of self and Community»[511]. Accordingly, the overall goal of the rules of IPLC legal approaches could be considered to be the promotion and conservation of the wellbeing of the environment and, consequently, of the group.

Customary laws impose duties and limits on the members of the community in order to provide for the protection of the environment, and by commanding the protection of the environment such customary laws aim to ensure the protection of the community, future generations and the individual subject him/herself. For as long as it remains true that there is a densely imbricated co-dependency between community and local environment in this way, the duty made conditional for the concept of biocultural rights might not after all be an unacceptable imposition of the environmental expectations of an eco-awakening international legal system based on worldview commitments incompatible with IPLC commitments. In such a traditionally intimate human-environmental relationship, the recognition of a stewardship duty might appear to be a step towards the recognition of rights mirroring a fundamental structure of IPLC legal approaches and practices: a structure at the centre of which there is the protection of the environment.

However, as has already been noted, the fact that IPLCs might adapt their customary laws, beliefs and worldviews to an encroaching economic system and a wider, globalising world includes the possibility that the environment loses its centrality in IPLC legal approaches, values and norms. Precisely because this may happen, biocultural rights position themselves at an uneasy borderline between the IPLC right to self-determination and the conservation of the environment. In this set of tensions, the conservation of the environment - as an enforceable legal duty placed upon IPLCs as environmental stewards for the whole of humankind - is potentially balanced with the entitlements of IPLCs - with concomitant duties being placed on States, corporate actors and international institutions.

In short, the rhetoric and strategy of biocultural rights build on the tension emerging from the dual foundations of biocultural rights, with potentially complex implications for IPLCs.

4.3.2. Indigenous Peoples and Local Communities: Rhetoric, Strategy and the Need for Critical Awareness

The traditional intimacy between IPLCs and their living environments and natural resources is an important reason for the emergence of a biocultural rights

[511] (Bavikatte, 2014, p. 6).

discourse. This intimacy, also recognised by IPLCs themselves, is also a strong reason why an engagement with biocultural rights as an emergent category of human right is so important to address – because, when placed within the existing human rights and environment debate, it is a hopeful clue to finding ways to address the current global environmental crisis. That said, it is important to acknowledge that placing so much emphasis upon the relationship between IPLCs and the environment requires us to bear in mind a warning issued by Jared Diamond:

> «Above all, it seems to me wrongheaded and dangerous to invoke historical assumptions about environmental practices of native peoples in order to justify treating them fairly. [...] By invoking this assumption to justify fair treatment of native peoples, we imply that it would be OK to mistreat them if that assumption could be refuted»[512].

To emphasise the environmental role of IPLCs does indeed present the danger of subordinating IPLC rights to a role as environmental stewards. Biocultural rights, as conceived by Bavikatte (and drawn from environment-related international documents and agreements) cannot evade this danger, since the theoretical construct of biocultural rights is grounded precisely on IPLCs' stewardship role towards ecosystems and biodiversity - and not just in their own interests - on behalf of the environmental interests of humankind as a whole. How then, might this danger be addressed?

Jonas *et al*. in *The Living Convention*[513] argue that this danger implies the need to draw a distinction between indigenous peoples and local communities within biocultural rights discourse. The concept of biocultural rights as presented by Bavikatte refers to both indigenous peoples and to local communities, and the two groups are co-referents for the same umbrella of rights. Jonas *et al*., by contrast, suggest that biocultural rights may be appropriate to describe the claims that local communities are making, but not the claims of indigenous peoples[514]. This suggestion hinges on the special dependency of local community rights on environmental contexts - a factor distinguishing them from indigenous peoples (which possess a special recognition in *their own right*). Local communities, Jonas *et al*. argue, unlike indigenous peoples, lack recognition in international law and are only lately gaining acknowledgment: despite the fact that the Inter-American Court on Human Rights has recently recognised certain indigenous rights of local

[512] (Diamond, 2005, pp. 9–10).
[513] (Harry Jonas et al., 2013).
[514] (Harry Jonas et al., 2013, p. 26).

communities of descendants of African slaves[515], local communities cannot yet be regarded as holding the same rights or status as do indigenous peoples[516].

The first recognition of local communities as right-holders is found in article 8j of the CBD[517], and such recognition has since appeared in many other international documents issued by UN bodies, UN treaties and other international organisations[518]. In all of these documents, as noted above[519], local communities come within the framework of consideration because of their relationship with the environment. They come into consideration, in other words, precisely because of their role for the conservation of certain environmental assets or ecosystems - not because of their existence as communities. For such communities, therefore, the linkage between biocultural rights and stewardship duties does not seem to present the same kind of dangers as it does for indigenous peoples. For Jonas *et al.* «it seems appropriate to talk of local communities» biocultural rights because «this approach better describes the claim they are making and consequently the specific rights for which they are calling»[520]. By contrast, Jonas *et al.* argue that indigenous peoples are holders of indigenous rights and «can exercise certain rights under international law regardless of the type of lifestyle they lead»[521]. They can claim indigenous rights, widely recognised in international law, purely because of their *indigenous status* and regardless of their stewardship role towards the environment[522]. The true foundation of indigenous rights «is an extensive connection to the land of their ancestors and the critical importance that has for their identities and contemporary ways of life»[523]. Such rights, Jonas *et al.* argue, do *not* arise from environmentally related considerations and do not bind their holders to any conservation-oriented conduct: «indigenous rights were developed within the framework of general human rights»[524] and, as such, they are specially secured. Biocultural rights, by contrast, are *sui generis* human rights based on a general interest for the conservation of the environment in combination with the special interests of their holders, and are, accordingly, inherently limited and attached to duties. Therefore, for Jonas *et al.*, unlike for Bavikatte and Robinson,

[515] (Antkowiak, 2007). For references and more info on the Inter-American Court cases, see above at 1.3.1.
[516] (Harry Jonas et al., 2013, p. 26).
[517] (Harry Jonas et al., 2013, p. 24).
[518] (Harry Jonas et al., 2013, p. 24). For example, in resolutions of the Conference of the Parties and Guidelines of the Ramsar Convention on Wetlands, resolutions, policy documents and guidelines of the International Union for the Conservation of Nature (IUCN) and the World Wildlife Fund (WWF).
[519] See section 1.3.1.
[520] (Harry Jonas et al., 2013, p. 26).
[521] (Harry Jonas et al., 2013, p. 26).
[522] (Harry Jonas et al., 2013, p. 26).
[523] (Harry Jonas et al., 2013, p. 23).
[524] (Harry Jonas et al., 2013, p. 23).

biocultural rights discourse is not appropriate for encapsulating the rights of indigenous peoples.

The critique presented by Jonas *et al*. requires the clarification of three further points concerning the theoretical construction of biocultural rights and how this relates to international law and to indigenous peoples' interests.

The first clarification concerns whether indigenous peoples are or are not holders of biocultural rights. This is a matter of definition. This thesis has analysed the formulation of biocultural rights as provided by Bavikatte and Robinson and based on the words of the CBD and the Nagoya Protocol, all referring to "indigenous and local communities". Under this definition of biocultural rights, those indigenous peoples that have preserved sustainable lifestyles meet the requirements to be regarded as holders of biocultural rights (though their retention of that status, as has been explored above, remains conditional on the maintenance of sustainable lifestyles).

The second clarification concerns whether, as Bavikatte and Robinson argue, biocultural rights are "emerging" (in the process of being recognised) rights in international law, and if so, to what extent - or whether biocultural rights are more accurately understood to be a theoretical construction *de iure condendo*, a political ideal to be pursued. As discussed above[525], this point, though important, is left open for future investigation.

The third clarification concerns the question of whether it would be strategically helpful for indigenous peoples to ask for the recognition of biocultural rights or whether they might encounter more costs than benefits by framing their claims in these terms. Might biocultural rights improve the chances of indigenous peoples seeing their interests protected and counteract a history of marginalisation? First, the recognition of biocultural rights would not enhance the legal position of indigenous peoples. This is because such peoples are already holders of the rights included in the basket of biocultural rights as holders of indigenous rights. Indigenous rights, as has been noted, are already recognised in international law and are therefore protected by international courts (such as the Inter-American Court on Human Rights, the African Court on Human and Peoples' Rights and the European Court of Human Rights). Indigenous peoples are not constructed by such law and cases as holders of a duty to conserve the environment, and nor is their right to self-determination thereby limited. Secondly, as has been argued here, the

[525] See above 4.1.2.

use of biocultural rights arguments to promote indigenous interests could present the danger, as raised by Diamond[526], of conditioning indigenous rights to environmental considerations. This runs the additional risk of tying the discourse about indigenous peoples' rights to their role in the conservation of the environment rather than to their extensive connection to ancestral lands.

Despite these dangers, however, it is possible that demanding the recognition of rights under the label of biocultural rights could be strategically useful for some indigenous peoples still struggling to see their indigenous rights upheld by a State. Many developing countries are facing a strong call from the international community for the conservation of the environment within their territories. Many States struggle to address this call because of limited economic resources and because they are also called upon to promote the costly implementation of rights to health, to education, to food and water, and indigenous peoples' rights. A State might therefore be more inclined to attend to a call for biocultural rights rather than to a direct call for indigenous rights because biocultural rights discourse addresses a human rights issue and simultaneously comes with the "compensation" of environmental conservation.

There is a second potential strategic advantage to biocultural rights discourse: their rhetoric can sound more politically neutral, precisely because, as Bavikatte and Robinson argue, biocultural rights do not carry the «undertone of self-determination that made States nervous»[527]. This is precisely because biocultural rights «were predominantly lobbied for [...] as "environmental rights" of communities to ensure biodiversity conservation»[528], thus directing governments' attention towards environmental and human rights issues rather than to self-determination claims.

Thirdly, and even more importantly - and relevant for local communities as well -, biocultural rights could yet be a strategic instrument to help IPLCs to protect their ways of life through a much needed *landscape approach*[529] as an answer against the

[526] See beginning of this section.
[527] (Bavikatte & Robinson, 2011, p. 50).
[528] (Bavikatte & Robinson, 2011, p. 50).
[529] (Harry Jonas, Jonas, & Makagon, 2014). The *landscape approach* proposes to look for the appropriate rights to recognize to a certain community or people by looking at the different human and natural elements of the *landscape* where they live. It is an evolution of the *ecosystem approach* proposed by the CBD. The latter was proposed as an alternative to the *species approach* common until that moment in international law. The ecosystem approach is the guiding principle of all programs of work of the CBD and «is based on the application of appropriate scientific methodologies focused on levels of biological organization, which encompass the essential structure, processes, functions and interactions among organisms and their environment. It also recognizes that humans, with their cultural diversity, are an integral component of many ecosystems» (Secretariat of the Convention on Biological Diversity, 2004).

current fragmentation of landscape by national and international law. Biocultural rights could prove strategically useful modes of claim in a context where there are an increasing number of laws, programs and declarations concerning indigenous peoples and local communities and the protection of the environment providing for rights to access to land, benefit sharing, traditional knowledge, carbon emissions, protected areas and much more, but which are essentially fragmented, addressed by different bodies, and found in diverse sources and categories of law[530]. IPLCs, in order to protect interconnected aspects of their lives - all part of the same biocultural landscape - have presently to engage with a plethora of legal sources: «at least with the laws and institutions addressing land, biodiversity, agriculture, protected areas, and potentially access and benefit sharing»[531]. This process of fragmentation of the local landscape by national and international law, is one of the reasons that inspired Posey to develop his TRR integrated rights approach[532] and to look for a more comprehensive body of law that specifically addresses the overall issues facing IPLCs[533]. Bavikatte's deployment of rights under one umbrella label has the advantage that biocultural rights might hold out the political hope of presenting a single interdependent and comprehensive call: a claim for the recognition of biocultural rights could draw together all of the different rights needed to promote the self-determination and conservation of the cultural diversity of a community or people.

Based on these three strategic advantages, and given the fact that many indigenous peoples are still struggling to see their indigenous status recognised by their States[534], biocultural rights discourse and claims could provide an alternative route for the fulfilment of indigenous claims. However, as the analysis here has clearly suggested, this strategy, for all its promise, is not without risk: for indigenous peoples to frame their call for rights in biocultural rights terms would not be a decision without a price to pay, and they would be claiming a category of rights which, unlike indigenous rights in international law, are inherently conditioned to the conservation of the environment. Any such strategy, therefore, should remain advertant to the potential threats lurking within claims for biocultural rights and proceed with considerable critical awareness of their implications.

Before moving to conclusions, I will briefly discuss one more critique that could be raised to the theoretical construct of biocultural rights: that they are nothing

[530] (Harry Jonas et al., 2014).
[531] (Harry Jonas et al., 2014).
[532] (Harry Jonas & Shrumm, 2012).
[533] (Harry Jonas et al., 2014).
[534] (Xanthaki, 2007, p. 133).

more than a set of distinct rights and duties of different subjects, i.e. right to self-determination of indigenous peoples, right of local communities to maintain traditional and sustainable ways of life, right of humankind to the conservation of the environment, duty of States to respect the rights of IPLCs, duty of IPLCs to conserve the environment, and so on. And, it follows, there is no such a thing as biocultural rights, but only distinct rights and duties gathered by Bavikatte under one name. This critique appears to me to be correct but wrongly placed. It is true that biocultural rights are an assemblage of rights and duties distinguishable one from another, and this is also, indeed, how they have been described. But it is also true that these rights and duties derive, logically and necessarily from two common justifications. Following an Interest Theory approach, one or more interests (justifications) considered worth of legal protection give rise to one or more rights, and necessarily of duties. Truth is that biocultural rights have an unusual configuration of the holders of rights and duties, as they at times overlap – IPLCs are both right and duty holders. However it is not a requirement of the Interest Theory that the holders of rights are not also holders of duties. Moreover this critique would be wrongly addressed. The reason why, as I have explained, the theoretical construct of biocultural rights is appropriate, is not because it raises new un-debated interests, but because, by gathering these interests together, it facilitates the addressing of certain problems. As explained above, there are *strategic* considerations to use biocultural rights, to claim for them rather than for claiming for many distinct rights in different *fora*, or than claiming for more politically-challenging rights, such as indigenous peoples' rights or self-determination rights. Hence, the critique is correct when saying that biocultural rights gather distinct rights and duties, but it fails to see how they derive from common protected interests and it fails to recognize the strategic, rather than ontological, relevance of the theoretical construct of biocultural rights.

Chapter 4.4. *Conclusions*

Part 4 of the thesis has presented an exploration of the theoretical construct of biocultural rights as proposed by Bavikatte (and, to a lesser extent, by Robinson). The analysis has engaged with the dual foundations of biocultural rights in the self-determination and cultural identity of IPLCs, and conservation of the environment - and has explored the consequences of this heterogeneous combination of protected interests.

As has been emphasised, Bavikatte's construction of biocultural rights centrally hinges upon an assumption that many indigenous peoples and local communities have a special stewardship role towards the environment, and that such a role needs the protection of certain rights in order to be maintained. Here, these rights were identified in three sets: rights to land and resources, rights to self-determination and rights to cultural identity. Each of these sets collects those rights useful for communities and peoples to conserve their lifestyles relevant for the conservation of the environment, and accordingly, form the core entitlements provided by biocultural rights. In order for such rights to be fulfilled States, private companies and international institutions have to abide by the corresponding duties (such as allowing indigenous peoples and local communities to live in their traditional lands, guaranteeing access and use of the natural resources found in those lands, refraining from imposing projects without prior informed consent, etc.). However - and crucially - the analysis offered here has suggested that these duties are not the only duties that biocultural rights give rise to. Environmental conservation is a justificatory foundation of biocultural rights, not only as an interest of IPLCs, but also as an interest of humankind - drawn from environment-focused international and national documents whose goal is precisely the protection of the environment for the benefit of the whole world. Hence both indigenous peoples and local communities *and the rest of humankind* are holders of biocultural rights. As a result, biocultural rights must also be understood to place upon IPLCs the responsibility to conserve the environment of their territories in order to protect this wider interest. Unless we fall into the ideological trap of the noble savage myth, then this responsibility to conserve the environment is to be interpreted as a duty, an enforceable one, to conserve the environment. Difficult questions persist concerning this central construction of IPLCs as holders of a duty to act as stewards. Minimally, further reflection to clarify the nature of sanctions to enforce the duty, the subjects entitled to claim for such enforcement and the standard of environmental protection to be used to

judge violations, seems necessary if biocultural rights discourse is to mature and develop a consistent degree of critical reflexivity. In particular, reflection is needed on the fact that biocultural rights seem to subordinate - to condition - a set of rights of IPLCs to a general interest, which itself is unlikely to be immune from potentially oppressive implications.

Bavikatte's concept of biocultural rights in particular presents challenges concerning the distinction (or lack thereof) between indigenous peoples and local communities as right-holders. While the analysis presented here acknowledges the importance of biocultural rights as useful strategic options for the framing of claims for local communities and as contingently useful strategies for indigenous peoples still struggling to see their indigenous rights respected - such strategies demand a high degree of critical awareness. While biocultural rights present a more politically neutral language than that of indigenous rights, they must be used in full consciousness of the price attached to them: the problematic conditioning of the protection of indigenous interests to the indigenous role as "stewards" of "the environment" for the rest of humankind.

There is no doubting the richness of biocultural rights discourse as a field for further engagement and research. Nevertheless, the tensions emerging from Bavikatte's formulation of biocultural rights discourse stands in need of further research, evaluation and reflection. New inputs from practitioners and indigenous peoples' and local communities' representatives are particularly necessary in order to provide a clearer picture of the strategic advantages and disadvantages of biocultural rights claims and discourse as it develops. The present analysis confirms the intriguing promise of biocultural rights discourse as an important forum of enquiry concerning the search for new strategies to face the current environmental crisis, in which we see indigenous peoples as important co-agents in building alternative futures. Even though, and because, they have conserved legal systems and ethics different from ours they my help us create new and more successful relationships with the environment. It is exciting to see a discourse attempting to draw creatively upon human-rights-compatible principles and non-western ethics.

Entrance Gate to the Bwabwata National Park, Buffalo check point

Part 5. Case Study - Testing Biocultural Rights: The Khwe People in Bwabwata National Park

Chapter 5.1. *Introduction*

The beauty of Bwabwata National Park, located in the Caprivi Strip[535], Namibia, strikes you since the first step after the entrance gate, at the Buffalo check point. Equally striking is the thought of spending a few days within its borders without a car filled with water, food and good camping gears. Nevertheless, for the last few hundred years the Khwe, have lived in those lands, have grown and developed their language, culture and identity and have survived not only the harshness of the place but also several conflicts occurring with other tribes, different colonial governments' oppressions and military occupations. Today, after more than 20 years from Namibian independence, the Khwe still live in those lands, and about 1500 of them have been encroached inside the borders of the Bwabwata National

[535] The name *Caprivi Strip* has been changed into *Zambesi Region* in August 2013 as part of the Namibian process of post-independence renaming.

Park[536]. Their 12 communities descend from the San, hunter-gathers indigenous peoples, also known as Bushman, often described as the first human beings of the world. The communities have undergone centuries of struggles due to different migration and colonization events in Namibia and have continued to rely on traditional practices for their livelihoods, mostly veldt food products and hunting. Even though Namibia is one of the African countries that has the most advanced legislation on the interaction between communities and conservation of the environment, it does not provide, as yet, indications on the rights of indigenous peoples and local communities living inside national parks. The Khwe communities, even though they have received support by many local organizations, still lack the recognition of rights to gather veldt products, to hunt and to access their lands to transmit to the new generations their traditional knowledge and customary practices. Strongly concerned about the loss of their knowledge and practices, and struggling to survive with limited access to their livelihoods, they have gathered to ask the support of the Non Governmental Organization Natural Justice: *lawyers for communities and the environment* for the development of a Biocultural Community Protocol (BCP). BCPs are documents resulting from extensive consultations, legal-awareness-raising and community participation and aimed at framing the calls of indigenous peoples and local communities within the local, national and international legal framework. This Part, after a review of Namibian relevant environmental law, will present the history and current case of the Khwe communities and will describe the process of drafting their BCP. The workshop for the consultation was run with 22 participants from the 12 villages within the Park and was facilitated by the Centre for Indigenous Knowledge & Organizational Development, Ghana, and run jointly with the local organization Integrated Rural Development and Natural Conservation. During the consultation, the Khwe have showed the interest of the communities to obtain more rights on the access to natural resources within the highly restricted areas of the Park and to help the conservation of the local environment in collaboration with Park managers.

[536] (Legal Assistance Centre, 2006, p. 11).

Chapter 5.2. *National Background: Legal Review of Namibian Environmental Law and Policy*

5.2.1. Introduction

The present review of Namibian environmental laws and policies does not provide a comprehensive picture of all Namibian environmental norms. It rather aims at picturing all environmental laws and policies relevant for the case of the Khwe in the Bwabwata National Park.

5.2.2. International Law

Since 1990, when it gained independence from South Africa, Namibia started to develop its internal environmental law under the light of the principles of its new Constitution and of international multilateral environmental agreements (MEAs). Article 144[537] of the Constitution recognizes that the general rules of public international law and international binding agreements are part of the law of the State, as long as they conform with the Constitution.

Of the many signed international treaties, those that appear more relevant for the Bwabwata National Park and the Khwe communities living in the area are: the Convention on International Trade in Endangered Species of Wild Fauna and Flora (CITES, entered into force in 1991); the CBD (entered into force in 1997); the United Nations Convention to Combat Desertification in those Countries Experiencing serious Drought and/or Desertification (UNCCD, entered into force in 1997).

The CITES Convention aims at protecting endangered species by monitoring and regulating their international trade. Endangered animals and plants are listed in three different Appendices, depending on the level of threat that international trade poses to their conservation. Among Namibian species: 28 animal species and 1 plant species are listed in Appendix I[538]; 164 animal species and 121 plant species are listed in Appendix II[539]; and 3 animal species are listed in Appendix

[537] Article 144 Namibia Constitution: «Unless otherwise provided by this Constitution or Act of Parliament, the general rules of public international law and international agreements binding upon Namibia under this Constitution shall form part of the law of Namibia».
[538] Species listed in Appendix I cannot be internationally traded if taken from the wild. Only artificially propagated specimen can, with the due permits, be traded.
[539] Specimen taken from the wild belonging to the species listed in Appendix II can be internationally traded only within fixed annual quotas.

III[540]. It is interesting to note that, in 2000, recommendations were made at the CITES Convention of the Parties for the inclusion in Appendix II of the *Harpagophytum procumbens* and *Harpagophytum zeyheri*, commonly known as Devil's Claw, but the positive results obtained by the management of the harvest in Nyae Nyae Conservancy and in the Zambesi Region have halted the listing process.

Namibia is one of the signatory countries of the Rio Declaration, Agenda 21 and the CBD[541], hence is called to fulfil its responsibility towards the environment respecting the right of indigenous peoples to participate in the management of their territories[542], preserving and promoting their traditional knowledge[543], recognising and duly supporting their identity, culture and interests, and enabling their effective participation in the achievement of sustainable development[544]. Namibia has given implementation to the CBD with Acts and Policies and in particular through the National Biodiversity Strategy and Action Plan (see below).

Namibia is also a Party to the UN Convention to Combat Desertification. The Convention does not set specific obligations for parties apart for the duty to provide for the participation of the public in those decisions relevant for the management of water resources and land use. However, most importantly, the Convention creates an institutional basis for a global effort to mitigate desertification and drought by calling member States to engage in effective international cooperation, joint decision-making, common planning and project running.

5.2.3. Regional Law

The African Union

Like all other African countries, with the sole exception of Morocco, Namibia is a member of the Africa Union (AU). The AU, that came into life in 2002, acts through the determination of common Policies for all member States. The conservation and sustainable use of the environment is one of its overarching aims, together with the promotion of human rights. The African Charter on Human and Peoples' Rights, one of the milestone binding agreements within the AU

[540] International trade on species in Appendix III is restricted only for specimen originating from specific countries.
[541] See above at 4.1.2.
[542] Principle 22 of the Rio Declaration and Section 2.10 and 3.26 of Agenda 21.
[543] Section 3 of Agenda 21.
[544] Principle 22 of the Rio Declaration.

framework, «affirms that all peoples shall have the right to a general satisfactory environment favourable to their development» (Article 24). Moreover, Article 21 affirms that «all peoples shall freely dispose of their wealth and natural resources» and that «in case of spoliation, the dispossessed people shall have the right to the lawful recovery of its property as well as to an adequate compensation». The obligations of the African Charter are judged on by the African Commission on Human and People's Rights, a quasi-judicial body, and by the African Court, recently been entitled with judicial powers[545]. These two bodies have addressed a number of cases where violations of Article 21 and 24 have been found, most of which also involved the violation of other human rights. So far Namibia has never been brought in front of the Commission or Court, but their decisions and the interpretations they give of the African Charter can influence national courts' decisions and can promote the respect of certain principles in acts and Policies. For example, in the Endorois[546] and Ogoni[547] cases, respectively, the Court and the Commission have interpreted the African Charter as imposing on States the obligation to balance the value of the conservation of the environment with the rights of indigenous peoples to culture, development and access to natural resources and the obligation to promote and conserve a healthy environment in order to respect these same indigenous rights.

African Ministerial Conference on the Environment

Namibia is a member of the African Ministerial Conference on the Environment (AMCEN), a permanent forum established in 1985 where the Ministers of the Environment from African Countries meet to discuss and provide advocacy for a number of environmental related matters among which: the conservation of the environment, sustainable development and promotion of human rights, agricultural activities and food security. AMCEN provides guidance on the implementation of international environmental agreements, and on the harmonization and development of African environmental Policies and agreements. For example, AMCEN facilitated the revision of the African Convention on Conservation of Nature and Natural Resources, of which Namibia is one of the signatory Parties (however the Convention has not yet entered into force).

[545] In Namibia, in light of article 144 of the Constitution, the African Charter could also be adjudicated by domestic courts, however, it has never happened until today.
[546] Centre for Minority Rights Development (Kenya) and Minority Rights Group International on behalf of Endorois Welfare Council v Kenya, African Court decision 276 of 2003.
[547] See above at 4.1.2.

Southern African Development Community

As one of 15 other African States, Namibia is a member of the Southern African Development Community (until 1992 know as the Southern African Development Coordination Conference). Environmental conservation and sustainable development are part of its many objectives, implemented by the additional binding Protocols. There are, in fact, Protocols concerning many different topics, among which: energy, fisheries, forestry, mining, shared watercourses, tourism, trade, and wildlife conservation.

The SADC Protocol on Shared Watercourses entered into force in 2003 and aims at promoting a common, wise and sustainable use of shared watercourses by facilitating agreements among bordering countries and the harmonization of their Policies and laws on watercourses. The signatory States have agreed to use shared watercourses sustainably and equitably without harming the interest of the other stakeholder Countries. Namibia, Botswana, and Angola established, in 1994, the Permanent Okavango River Basin Water Commission that has the responsibility of advising the governments of the management of the Okavango River. Similarly, under the auspices of the Protocol, it was established in 2003 the Zambesi Watercourse Commission, an organization that gathers all the countries that share the Zambesi River Basin: Angola, Botswana, Malawi, Mozambique, Namibia, Tanzania, Zambia and Zimbabwe. The organization aims at: promoting the conservation and sustainable use of the basin, promoting research and capacity building, coordinating planning and use of the basin, harmonizing policies and legislations, resolving disputes, and raising awareness in the area.

The 1999 SADC Protocol on Wildlife Conservation and Law Enforcement aims at promoting the conservation and sustainable use of wildlife resources, with the exclusion of fisheries and forests, by promoting cooperation among the members, by binding members to protect their own resources and not to cause any harm to those of other States, mandating research on the status of wildlife, and establishing common management programs. In order to protect and sustainably manage wildlife, the Protocol encourages the creation of trans-frontier conserved areas and community-based natural resource management activities by facilitating interactions among States and establishing a Wildlife Conservation Fund.

5.2.4. Namibian Constitution

Namibia adopted its current Constitution in March 1990, after 30 years of struggle for independence from colonial and foreign rule. It is the highest law of the land and all acts, laws, policies and international agreements are applicable only if they are consistent with the provisions and principles of the Constitution.

The Constitution does not recognize a human right to the environment but contains provisions on environmental protection and sustainable use among the Principles of State Policy[548]. As Article 101 recognises, the Principles of the State Policy are not legally enforceable but are meant to guide the Government in its law-making and law-implementing functions and can be used by the national Courts in interpreting legal provisions.

Article 100 of the Constitution declares property of the State all «land, water and natural resources below and above the surface of the land and in the continental shelf and within the territorial waters and the exclusive economic zone of Namibia», unless they are legally owned by other subjects. Article 16 provides for all person to acquire, own and dispose of all forms of immovable property in any part of Namibia, however, private owners are limited in the exercise of their property rights by a duty of protection and sustainable use of natural resources. Article 95(l) affirms that the State shall adopt policies to maintain ecosystems, essential ecological processes and biological diversity, and to promote their sustainable use for the benefit of present and future Namibians. In order to ensure these obligations, the Constitution vests the national Ombudsman with the function of investigating complains concerning the environment. Article 89 to 94 (completed by the 1990 Ombudsman Act) establish an independent Ombudsman to protect citizens against violations of fundamental rights and freedoms by State and private actors, abuses of power by governmental officials, manifest injustice and corruption. They also vest the Ombudsman with the power «to investigate complaints concerning the over-utilization of living natural resources, the irrational exploitation of non-renewable resources, the degradation and destruction of ecosystems and failure to protect the beauty and character of Namibia»[549]. The Ombudsman receives complaints by individual citizens whose interests have been violated (and in some cases it can undertake proactive actions[550]) and it has to investigate their complaints and take appropriate remedial actions such as

[548] The Principles of State Policy are contained in Chapter 11, from article 95 to article 101.
[549] Article 91c of the Constitution.
[550] (Ruppel-Schlichting, 2013b, p. 485).

facilitating compromise between parties, referring to Prosecutor-General, bringing proceeding to competent Courts, make recommendations for the amendment of anti-constitutional pre-independence laws or other grossly unreasonable legislations. The powers of the Ombudsman to investigate and take action in environmental matters can be a very effective instrument for the protection of the environment and of rights related to it, however, so far the complaints concerning the environment are greatly outnumbered by all other matters[551].

5.2.5. National Laws and Policies

National management and planning

Namibia recognizes the inestimable value of its natural resources and lands and has dedicated many laws and policies to regulate their ownership, management and conservation. Shortly after independence, the 1992 Namibian's Green Plan, provided for the creation of laws and policies aimed at protecting a healthy environment and prosperous economy. It combined concerns for health of individuals and society, protection of the environment, development of the economy, poverty reduction, and improved education.

The Ministry of Environment and Tourism (MET) is responsible for the implementation of Namibia's obligations under international environmental agreements and is supported by the Environmental Commissioner[552] and the Environmental Officers. In 2001, the Environmental Investment Fund was established by the Environmental Investment Fund of Namibia Act. The Environmental Investment Fund is entitled to collect levies on protected areas entrances[553], and on certain commercial uses of natural products and to receive funds from the Parliament, in order to support the work of the MET. The Fund shall then allocate money for the implementation of environmental policies through grants, loans, bursaries and other financial aids to governmental, non-governmental and private organizations and individuals. Funds shall be allocated to support: the sustainable use and management of the environment; the conservation of biodiversity and ecosystems; «the improvement in the management of natural resources for the benefit of those whose livelihoods directly depend on natural resources or are most directly affected by protected areas for the promotion

[551] (Ruppel-Schlichting, 2013b, p. 482).
[552] The office of the Environmental Commissioner was established in terms of Section 16 of the Environmental Management Act.
[553] The Board of the Fund may determine the exemption of any category of persons form paying such levies (Republic of Namibia, 2001a, sec. 26).

of diversified sustainable rural development»; and the management of conservancies, game parks and nature reserves[554].

The 2007 Environmental Management Act[555], that came into force in 2012, establishes the general principles for the national management and conservation of the environment[556]: optimal sustainable yield in exploitation of natural resources; intergenerational equity in the management of Namibian cultural and natural heritage; involvement of local authorities in projects' monitoring; participation of the affected parties in decisions making, assessment and monitoring processes; community involvement in the management of natural resources and sharing of the benefits arising from their use; equitable access to environmental resources; precaution in decision making. In order to promote the respect of these principles and the sustainable management and use of the environment, the Act draws on the 1995 Environmental Assessment Policy that introduced a system of *environmental clearance certificates*[557]. Such certificates, now governed by the Act and its regulations, are required for the commencement of all those activities considered potentially harmful for the environment, among which are: forestry, land use and development, tourism development, agriculture and water resources developments. Such certificates are issued by the appointed Environmental Commissioner after an assessment procedure aimed at verifying their impact on the environment, their associated risks, the existing of alternatives and the mitigation options. The procedure that must be followed to obtain a certificate requires the presentation of the project, the consultation of any person, institution or authority that may be effected, the organization of a public hearing on the matter, the hearing of experts' opinions and any other activity considered necessary.

Vision 2030 is a document that provides a long-term Policy plan for the development of Namibia. It was issued in 2004 and aims at guiding Namibia until 2030. It is taken forward and revised every five years, through the issue of National Development Plans, more detailed and updated documents that plan future policies. Unlike its predecessors, the 2012 National Development Plan does not include environmental protection among its three overarching goals, however it does include it among its values and principles. As part of the development strategy outlined it also includes the following environmental related objectives: implementation of the Environmental Management Act; implementation of the Community-based Natural Resources Management (CBNRM) programme;

[554] (Republic of Namibia, 2001a, sec. 25).
[555] (Republic of Namibia, 2007).
[556] (Republic of Namibia, 2007, sec. 3).
[557] (Republic of Namibia, 2007, sec. 27 and 32–37).

improved cooperation and Policy implementation; promotion of partnerships between the public and private sectors and communities.

Lands

The 1994 Land Use Planning Policy proclaims the existence of five land types in Namibia: Communal Land, State Land, Proclaimed State Land, Private Land, and Wetland Systems. They can fall within different ownership regimes:

- state land: it includes land allocated for nature conservation (protected areas and game parks), agricultural research farms and military bases, and urban areas owned by local authorities;
- communal land: land vested in the State which the State shall hold in trust and administer for the benefits of the people who live on it;
- private land: it includes rural commercial farmlands[558] (freehold agricultural land), and private urban areas.

The 1995 Agricultural (Commercial) Land Reform Act[559] provides for the acquisition of agricultural land by the State for the purpose of levelling economic and social injustices of the past through the redistribution of such lands to those Namibians who do not own, or have the use, of adequate agricultural land. The Ministry may acquire agricultural lands from willing sellers, or may acquire or expropriate (subject to compensation), underutilized or foreign-owned or excessive lands. The allotments of such lands are then to be leased to chosen citizens for agricultural purposes only, and for a period not exceeding 99 years. The lessees can become owner of the land but only by buying it off from the Ministry.

The 1997 National Resettlement Policy regulates resettlements and requires them to be socially, economically and environmentally sustainable and to provide the grounds to make local communities become self-supporting.

The 1998 National Land Policy introduces the concept of unitary land, in contrast with the colonial regime organized around «first and second class systems of land tenure, divided along racial lines»[560]. The Policy aims at levelling out the injustices derived from the colonial land management by promoting equal rights and opportunities to all citizens and community involvement in land management.

[558] About 44% of Namibian land is labelled as commercial farmland (Bethune & Ruppel, 2013a, p. 178).
[559] (Republic of Namibia, 1995). The Act was amended by the Agricultural (Commercial) Land Reform Second Amendment Act, Act No. 19 of 2003.
[560] (Ministry of Environment and Tourism, 1998, Chapter 1.3).

It promotes sustainable land use and states that unsustainable use of land can lead to the termination or denial of a land title. It was then followed, in 2003, by the National Land Tenure Policy that, as the previous one, calls for a sustainable use of land. It provides for compensations for expropriated lands and for the recognition of land tenure rights to farm workers and occupiers (those that spent less than ten years on a single farm).

Communal lands

Communal lands are areas vested in the State «in trust for the benefit of traditional communities residing in those areas and for the purpose of promoting the economic and social development of the people of Namibia, in particular the landless and those with insufficient access to land»[561]. Any area which is part of un-alienated State land may be declared communal land by act of the President and approval of the National Assembly[562]. Communal lands are regulated by the Communal Land Reform Act, 2002, and, for what concerns the management role of Traditional Authorities (TA), by the Traditional Authorities Act, 2000. TA can be formed by traditional communities and are composed by: a leader, senior traditional councillors and traditional councillors elected by the community. Recognized Chiefs and TAs have the power to advise the President in issues concerning the utilization of communal lands[563] and have to role of ensuring the sustainable use of natural resources and the conservation of the environment within communal areas, as well as within conservancies (see below) for their own benefit and for the benefit of all Namibians[564]. They also have the power to exercise local customary laws and to codify such laws and to provide assistance to police and other State organs[565]. They decide upon applications for the allocation of customary land rights (rights to farming and residential units) and rights of leasehold[566]. The 2002 Communal Land Reform Act provides for the creation of Communal Land Boards (CLB), that include representatives of TAs, of organized farming communities and of the conservancies of the area. The CLBs shall verify and register the allocation of customary land rights by TAs and Chiefs, and may veto their decisions upon written justifications. CLBs may also grant leaseholds rights for agricultural purposes on portions of communal lands, but only within designated areas and subject to the payment of a fee. Any leaseholds of a duration

[561] (Republic of Namibia, 2002, sec. 17).
[562] (Republic of Namibia, 2002, sec. 16).
[563] (Legal Assistance Centre, 2006, p. 13).
[564] (Ruppel, 2008, p. 113).
[565] (Jansen, 2010, p. 19).
[566] (Republic of Namibia, 2002, sec. 19–20).

which exceeds 10 years need to be approved by the Ministry of Lands and no leasehold can be granted for a period that exceeds 99 years[567].

TAs and Chiefs also regulate access to and use of *commonage* areas for grazing purposes on the ground of the local laws. In commonage areas it is not allowed, unless by written consent by Chief or TA, to erect buildings, plough or cultivate, or obstruct access to water. TAs and CLBs regulate all other uses of lands, such as tourism and agriculture and, when communal lands overlap with conservancies, they shall take in consideration the objectives, plans and needs of the conservancies[568].

The 1995 Community-based Tourism Policy links tourism as a tool for conservation, to tourism as a tool for community economic and social development. The Policy recognizes that residents of communal areas have historically rarely been involved in the benefits of tourism activities while have often endured negative consequences for tourists intrusions and wildlife conflicts. It therefore calls for the private tourism sector that acts on communal lands to involve and share benefit with local residents so to provide incentives for conservation to those that bear the cost of wildlife. To promote the respect of these principles the Policy decides that applications for tourism enterprises will be judged also on the ground of the participation of the local communities in the planning process, on the environmental impact of the project, and on the sharing of the benefits arising from it.

Even though the Communal Land Reform Act provides for the allocation of rights over lands and resources to communities, land tenure rights remain vested in the State. The Act specifically states that «no right conferring freehold ownership is capable of being granted» on communal land areas[569]. Therefore, since Article 100 of the Constitution claims that the State is the owner of all lands that are not lawfully owned by other subjects, communities are bound to remain lessees and never to be recognized as owners unless their communal ownership is recognized in virtue of customary law and traditional practices since "time immemorial" as it has happened in many other cases concerning ancestral lands claims[570]. The current lack of formal land rights, together with the prohibition to erect fences within

[567] (Republic of Namibia, 2002, pt. 2).
[568] (B. T. B. Jones, 2012, p. 19).
[569] (Republic of Namibia, 2002, sec. 17).
[570] Such as for example the for example the Delmaguuk case in Canada, Mabo in Australia, Enderois in Kenya, Central Khalahari Game Reserve case in Botswana (P. Watson, 2013, personal communication).

communal land[571], results in limited abilities of local authorities to control the settlements of external actors, something that may strongly hinder their interests and plans[572].

Conservation of the Environment

Article 95(l) of the Constitution commits Namibia to conserve biodiversity and ecosystems for the benefit of all Namibians. It is given implementation by many acts and Policies under the umbrella of the National Biodiversity Strategy and Action Plan. The Strategy provides a strategic framework for the management of biological resources, regulating conservation, trade, and economic activities with the ultimate aim to conserve the environment and support sustainable development.

Protected areas and national parks

16.6% of Namibian land is designated to national parks and game reserves.

The Nature Conservation Ordinance, 1975, regulates the establishment of protected areas. It states that they may be established for the protection, propagation and study of wild species and «ethnological, archaeological, historical and other scientific interests»[573]. The Ministry of Environment and Tourism has the power and duty to manage and control parks and change, by simple decree, their boundaries, as well as their very existence (with exclusion of the Etosha National Park)[574]. Protected areas can fall within different typologies: state-run PAs, conservancies, and private reserves, but none of them falls within the IUCN typologies[575]. For example, there are no different typologies based on access and use rights by local communities.

The Ordinance establishes which activities are prohibited in protected areas without holding a permit: take or keep residence, convey weapons or traps, cause any veldt fire, capture or hunt animals, eggs, nests, and plants, introduce animals, and chop of trees[576]. These activities are prohibited also in private game parks, except to their owners[577].

[571] (Republic of Namibia, 2002, sec. 18).
[572] (B. T. B. Jones, 2012, p. 24 f). One of the biggest issues on communal lands is the growing practice of illegal fencing, a local form of land grabbing. Wealthier people fence off large areas of communal lands for their own benefits, usually private ranching activities, and deprive local people from access and use of resource found therein (P. Watson, 2013, personal communication).
[573] (Republic of Namibia, 1975, sec. 14).
[574] (Republic of Namibia, 1975, sec. 15–16).
[575] (B. T. B. Jones, 2012, p. 26).
[576] (Republic of Namibia, 1975, sec. 18 and 20).
[577] (Republic of Namibia, 1975, sec. 22–23).

The Policy on Tourism and Wildlife Concessions on State Land, 2007, addresses specifically those communities that live within or close to protected areas and that are negatively affected by wildlife from the protected area, show a commitment to the conservation of the protected area, are particularly needy because they are marginalized (the Policy specifically takes San communities as example). The Policy proposes the update and enhancement of the Namibian system of "concessions" in order to improve the livelihoods of communities and the conservation of the areas. Concessions are «rights, whether full or restricted or shared or exclusive, to conduct tourism activities and/or to commercially use state-owned plant and/or animal resources (collectively referred to as wildlife resources) on business principles in proclaimed protected areas and any other State Land for a specified period of time»[578]. The concessions are meant to be awarded to community representatives and institutions, such as conservancies, community forests, appropriately structured Trusts and registered community associations, and cooperatives, and recognized Traditional Authorities[579]. The Policy recognizes that in Namibia there are many different communities and prioritizes those living inside protected areas «because such communities potentially have the most impact on the park and are likely to be most negatively affected by wildlife or by loss of access to land and resources». These communities are recognizes as the most affected but also as those that might have the most negative effect on the park unless they are involved in the management of tourism and wildlife. Concessions should be preferentially awarded, the Policy states, directly to communities but, where the community lacks the capacity and/or the capital, joint ventures or other forms of partnerships with other entities are accepted. Nevertheless the agreements signed between community and partners have to provide for sufficient involvement and participation of the community and equal sharing of benefits.

Even though the Policy has been issued in 2007, there still is no piece of legislation regulating the life of communities within protected areas, such as the Khwe communities in Bwabwata. The Policy can foster initiatives and acts of the MET but needs to be supported by the adoption of an adequate legislation.

Conservancies

The 1995 Ministry's Policy on Wildlife Management Utilisation and Tourism in Communal Areas provides for the overcoming of some of the discriminatory facets

[578] (Ministry of Environment and Tourism, 2007, p. 4).
[579] (Ministry of Environment and Tourism, 2007, Annex 1).

of the 1975 Natural Conservation Ordinance[580] and for the creation of incentives to conservation for local communities. The Policy recognises that before colonial times, local communities beliefs and values made them good stewards of the environment and provides for them to regain such responsibilities toward wildlife[581]. The Policy establishes that communities living in communal areas are to be recognized limited rights over wildlife so as to be able to manage them sustainably and to benefit from them and from related tourism activities. The Policy was followed by the 1996, Nature Conservation Amendment Act, that amended the Natural Conservation Ordinance. The Act provides for the creation of conservancies in communal and commercial lands as means for communities to gain rights and benefits over wildlife and tourism and to incentivize conservation. Today there are 71 registered conservancies, that cover 149 829 km^2 of communal land (about 18% of Namibian land)[582].

The Nature Conservation Amendment Act establishes the application procedure for the creation of a conservancy[583]. Any group of persons residing on communal land has to appoint a Conservancy Committee, agree on a Constitution that sets the sustainable use of wildlife as one of its objectives, determine the means for an equitable sharing of the benefits arising from wildlife use, and propose the boundaries of the conservancy. After scrutiny of the presented documentation, the Ministry may declare the area a conservancy, however this act does not grant any land right to its members. They are instead awarded ownership rights only over all huntable game (eland, oryx, springbok, kudu, warthog, buffalo and bushpig[584]). It means that the members of the conservancy can hunt and use unprotected species without further authorizations from the Ministry, but only within the limits of restrictions imposed by the ministries, i.e. hunting permits, weapon restraints, hunting quotas. The conservancy can agree with the Ministry on certain quotas for the use of protected species (see below) for trophy hunting, sale and other activities and can then sublicense the quotas to local tourism companies. The latter can agree with the conservancy for the creation of joint ventures or other partnership schemes for the creation of tourism infrastructures and activities. In case of droughts or human-wildlife conflicts the conservancy can require to the Ministry further permits to shoot or displace problem animals. All the benefits arising from the use of wildlife and tourism are received by the conservancy and

[580] (Hinz, 2013, p. 361).
[581] Ministry's Policy on Wildlife Management Utilisation and Tourism in Communal Areas, 7-8.
[582] (B. T. B. Jones, 2012, p. 11).
[583] (Republic of Namibia, 1996, sec. 24(A)).
[584] (Republic of Namibia, 1975, schedule 5).

have to be shared among all the members of conservancy in line with their Constitution.

Forests

About 9.3% of Namibian land is covered by forests[585]. Deforestation is a major challenge for Namibian conservation efforts and it is mostly caused by clearance for agriculture, uncontrolled fires, selective logging and use of wood for livelihoods[586]. In 1996, the MET issued the Namibian Forestry Strategic Plan to guide action toward the conservation of forests for their socio-economic value and for the protection of biodiversity. The Plan proposes a decentralized system of forest management and conservation: recognition of private or communal rights over lands and/or resources to local populations in return for forest protection. Only when these decentralized options are considered inefficient, the State should directly take care of putting the forest under protection.

The 2001 Forest Act is the main piece of legislation on forest management. Together with the Development Forest Policy, 2001, it regulates the use of forests around the central aim of balancing conservation and rural development[587]. The Act establishes a Forestry Council, in charge of advising the Minister on forest matters and creates three types of forests: State Forest Reserves, Regional Forest Reserves and Community Forests[588]. All types of forests shall be managed and developed, the Act establishes, to conserve soil and water resources and maintain biodiversity.

Community Forests[589] should be regulated along with the Community Forests Guidelines issued in 2005 by the Ministry of Agriculture, Water and Forestry, however the document has ever since remained non-binding. Up to 2012 there were 13 community forests in Namibia, covering 4,652 Km^2 [590]. The Ministry can sign a community forest agreement with any entity (be it a chief, a Traditional Authority or other) that it recognizes as representing the interests of the communities that reside and have control over, or traditional rights over, the communal land where the forest is found. The community representatives have to propose the boundaries and present a Forest Management Plan to be agreed with the Ministry. On the ground of the agreement, rights are awarded on: use of forest products, grazing, control of the use of forest products by outsiders and relevant fees, and quotas of

[585] (Ruppel-Schlichting, 2013a, p. 28).
[586] (Ruppel-Schlichting, 2013a, p. 28).
[587] (Ruppel, 2013, p. 127).
[588] (Republic of Namibia, 2001b, sec. 16).
[589] (Republic of Namibia, 2001b, sec. 15).
[590] (B. T. B. Jones, 2012, p. 11).

timber and wild animals that the community can collect. Alike conservancies, community forests retain 100% of the income derived from use of local resources, but they include also timber and other forest products. The community has the duty to create a Forest Management Committee that has to ensure the management of the resources and the distribution of the income is done in accordance with the Management Plan and has to submit reports to the Ministry every month.

Where, and only where, the effective management of forest resources of national importance or the conservation of ecosystems and biodiversity of a forest found in a communal land cannot be achieved through the management of that communal land as a community forest, the Minister or the Regional Council can, respectively, declare that forest to be a State Forest Reserves or a Regional Forest Reserves. The Forest Act requires the local residents to be informed and their requests and needs to be given due attention[591]. Sections 21-23 of the 2001 Forest Act provide for the creation of protected forests whenever the Minister of Environment and Tourism is satisfied that on a certain area it is necessary for the protection of local soil, water, and biodiversity. The Minister shall consult the owner or occupier of the land in question, including the local chief or Traditional Authority in communal lands, and agree with them on the measures required for the protection of the forest and on their other obligations. The Minister is also required to pay compensation to the owner of the land or the members of the community if the long-term use of the land is substantially diminished.

Wildlife

The Ministry of Environment and Tourism is responsible for the conservation of wild animals and plants and for the management of "problem animals". The Nature Conservation Ordinance, 1975, lists and regulates wild animals within three different categories[592]: specially protected game[593], protected game, huntable game, huntable game birds. Specially protected game and protected game shall not be hunted at any time and by any person unless lawfully holding a permit issued by the MET. Killing of such species is permitted only to a landowner or to the occupier of communal land to defend human life or health, or to protect life of livestock, poultry or domestic animals. Moreover, they «may hunt any game, excluding elephants, hippopotami and rhinoceros, destroying or damaging crops or

[591] (Republic of Namibia, 2001b, sec. 13–14).
[592] (Republic of Namibia, 1975, Chapter III).
[593] Mountain zebra, giraffes, klipspringers, elephants, rhinoceros, impalas, hippopotamus, white rhinoceros, zebras (Republic of Namibia, 1975, Schedule III).

plants on any cultivated land on such land»[594]. In special circumstances, any wild animal may be declared by the Ministry a "problem animal" hence becoming huntable at any time by the owner or lessee of a land. This provision is explicitly not applicable within game parks[595]. Huntable game and huntable game birds are under the property of the owner of any adequately-fenced farm or of any piece of land no less than one thousand hectares. The owner can hunt such game and can issue hunting permits to outsiders (and require a fee in return).

In 1994, the MET issued the Policy for the Conservation of Biotic Diversity and Habitat Protection to guide laws and regulations aimed at adequately protecting all species and subspecies, ecosystems and natural life support processes. The instruments it proposes are very heterogeneous and range from inventories to monitoring and research, from education to cooperation with local, national, regional and international organizations.

In 1997 it was issued the Game Products Trust Fund Act that established a Trust Fund to collect revenues from the use of game products belonging to the State, such as for example the sale of ivory's quotas allowed by the CITES Convention, and to receive donations for conservation purposes[596]. The funds are meant to be used to improve conservation and management of wildlife resources, to support rural development, and to improve the relationship between people and wildlife[597]. Funds are distributed to conservancies, protected areas and wildlife councils upon presentation of projects and priority is to be given to returning funds to the areas of origin of the game products[598].

Soil

The Soil Conservation Act of 1969, as amended until 1978, regulates the combating of soil erosion, and the conservation and improvement of the use of soil and vegetation and the protection of water sources. It confers the Ministry the power to issue direction to land owners or occupiers in order to dispose changes in land uses and destinations and to expropriate lands when the practiced activities may cause any form of soil erosion, denudation, disturbance or drainage of land, or water pollution[599].

[594] (Republic of Namibia, 1975, sec. 37).
[595] (Republic of Namibia, 1975, Chapter IV).
[596] (Republic of Namibia, 1997, sec. 2).
[597] (Republic of Namibia, 1997, sec. 3).
[598] (Republic of Namibia, 1997, sec. 14).
[599] (Republic of Namibia, 1969, sec. 3 and 18).

Agriculture

Namibian lands are very fragile and land degradation threatens more than half of Namibian population that relies on agricultural activities for livelihoods[600]. Given their great importance there are many policies and pieces of legislation that target land use and agriculture. They provide farmers with administrative support to decentralize land management and aim at promoting community-based resources management[601].

The 1995 National Agricultural Policy and the 1997 Regional Planning and Development Policy deal with agricultural production. As a means to increase food production, improve employment opportunities in rural areas, enhance income and household food security, they promote the increase of self-sufficient smallholder agricultural production and limit State aid only to specific short-term circumstances. The National Agricultural Policy stresses that agricultural prosperity is not the sole responsibility of the State but also of farming communities and the private sector. Rural people are invited to reduce their dependence on the government and changes are enacted to promote a higher participation of the private sector in agricultural activities. The Policy eliminates subsidies and price control and fixing because they might distort the market and discourage private investments. Prices shall instead be set by the market forces. The Policy disposes for the privatization of services previously provided by the Government, such as farm inputs (seeds, agro chemicals, animal feeds, drugs, equipment), credits, veterinary care, quarantine facilities and domestic marketing. The State is presented as an inefficient manager of business and funds and is left accountable only to provide very essential services where the private sector is unwilling or unable to participate. It is disposed also that access to water and irrigation services shall be provided by private entities rather than the government and, in order to encourage self-sufficiency, water users will be required to pay for the operation and maintenance of their irrigation schemes. To promote agricultural development the Policy counts on investments by the public and private sectors in new technologies, and on more public investments in formal education. It calls for the introduction of high-productive crops and extensive livestock production in under-utilized areas and the introduction of non-traditional high-value agricultural product for the foreign market. Finally, the Policy addresses drought and other calamities through long-term planning and public-private management mechanisms, all to be used in order to create local self-coping capacities.

[600] (Bethune & Ruppel, 2013a, p. 175).
[601] (Bethune & Ruppel, 2013a, p. 175).

The Regional Planning and Development Policy recognizes the vulnerability and aridity of Namibian ecosystems and requires the utilization of Environmental Impact Assessments in the management of agricultural activities so to avoid that their expansion may become a threat.

Waters

Namibia is one of the driest African countries and water issues are perceived as particularly critical and fragile. All Namibian water sources are recognized to be an indivisible national asset, whose custodian, on behalf of all society, is the government. Water can be privately owned when it flows on a private land, but the Minister of Agriculture, Water and Forestry retains the power to limit the use of the owner.

The 1956 Water Act is the main piece of legislation on water management in Namibia because the 2004 Water Resources Management Act has not yet been implemented. The Water Act makes the MET, in particular the Department of Water Affairs, responsible for the conservation, management and use of all watercourses. It recognises property rights to land owners over the water courses, superficial or subterranean, found in their lands but strictly limits their rights to uses within their land' borders[602]. It declares all surfaces and under water coursers, that are not found in private land, to be property of the State, and the Ministry can regulate their use, as it deems necessary. Public water can be accessed and used by any person for immediate purposes, such as drinking, washing, cooking, sanitation, and watering of crops no bigger than one hectare[603]. Instead, irrigation activities may be subject to government-imposed levies and other uses shall be agreed with the Ministry.

The 1993 Water and Sanitation Policy recognizes the importance of an efficient and sustainable management of water resources to guarantee economic development and health. It creates the Directorate of Rural Water Supply and establishes 200 Water Point Committees for the local management of water supplies. Decentralization and polycentrism are perceived as two instruments to guarantee a more efficient management of water resources. Communities are recognized the right to manage their water resources but they have to contribute to costs. Costs that are regulated through the 1997 Water Corporation Act, which established the Namibian Water Corporation Limited. It is a public company that has the duty to manage water supplies and waterworks, and to set water levies and

[602] (Republic of Namibia, 1956, sec. 5).
[603] (Republic of Namibia, 1956, sec. 7).

tariffs in the Namibian territory in the most cost effective way, with due regard to the needs of the consumers, the conservation of the environment and the sustainability of water uses.

When it enters into force, the 2004 Water Resources Management Act will require Namibian water resources to be managed in ways consistent with the following principles: equitable access by every citizen to adequate quantity of water, within a reasonable distance from their place of adobe; recognition of the human right to water; harmonization of human needs with environmental needs; integrated planning and management of water resources; public access to information; sustainable development and use of water resources; awareness raising; prevention of pollution; meeting of Namibian international obligations in relation to shared water resources; decentralization of governance. The Act provides for the creation of a system of Water Basin[604] Management Committees[605], 8 of which had already been established by 2011[606]. The Committees shall protect, develop, conserve and manage water resources in their area, promote community participation and self-reliance, prepare water resources plans for the basin to be submitted to the Ministry, manage waterworks, report of the impacts of Policies and help resolve conflicts. The Act also provides for the establishment of a system of registered Water Point User Associations that have to be elected by groups of rural households using a particular water point[607]. The members of the Water Point Association have to elect a Water Point Committee to manage the day-to-day affair of the water point. When two or more Water Point Associations are sharing one rural water supply scheme they have to come together to establish a Local Water User Association. The Local Water User and the Water Point User Associations are responsible for use and conservation of the water points, shall manage the use of water by members and non members and can act to enforce water regulations and against water wastes and other damages[608].

According to the Act, any person can access and use water for domestic uses without payment of fees or need of licences. Any other use will require a licence. Limits may be imposed if the Ministry creates a Water Management Area for the purpose of guaranteeing the conservation of its natural resources[609]. However, the

[604] Basins are defined by the Act as areas «from which rainfall drains into a common terminus» (Republic of Namibia, 2004, sec. 1).
[605] (Republic of Namibia, 2004, pt. IV).
[606] (Bethune & Ruppel, 2013b, p. 166).
[607] (Republic of Namibia, 2004, pt. V).
[608] (B. T. B. Jones, 2012, p. 23).
[609] (Republic of Namibia, 2004, pt. XII).

Ministry has to adequately consult with the interested parties and keep in considerations their needs when deciding over the limitations imposed.

This Policy is now backed up by the 2002 National Water Policy White Paper, which is centred on the idea that Namibian scarce water resources are essential for human needs, economic development activities and environmental conservation. The Policy provides for a wise management of water resources for the benefit all Namibians, of present and future generations, and for the preservation of the environment, through the participation of stakeholders and the decentralization of decision-making procedures and through the effective implementation of the "polluter pays principle".

Cross-border watercourses

Namibia is committed by international agreements to a certain use of shared watercourses. The National Water Policy implements such obligations and commits Namibia to use shared watercourses sustainably, to equally share the benefits arising from their use, and to respect the rights of local communities. The 2003 Inland Fisheries Resources Act calls for cooperation with countries with which rivers and other water resources are shared. The Water Resources Management Act recognizes obligations of Namibia under the UN Convention on the Law of the Non-Navigational Uses of International Watercourses and the Southern African Development Community Protocol on Shared Water Courses and requires the Ministry to collaborate with riparian States for the management of shared watercourses in respect of international and regional agreements[610]. The Ministry shall engage in joint planning and project development and shall collaborate in the collection and analysis of relevant data about the watercourse, in order to promote environmentally sound economic growth.

Inland fisheries

The 2003 Inland Fisheries Resources Act deals with the conservation and management of inland fisheries and requires the Minister to promote the sustainable utilization and protection of inland fisheries resources in accordance with international laws and agreements.

Fishing is allowed, without regulated fishing gears (rod, real, line, hook and net), to owners or lessees in private lands and to communities in communal areas. In order to fish with regulated gears it is required to hold a fishing license issued by

[610] (Republic of Namibia, 2004, pt. X).

the Ministry or a designated officer, upon payment of a fee[611]. The Act prohibits altogether destructive fishing methods, such as use of chemicals and explosives, and forbids fishing in game parks, natural reserves, up until 100 meters from a bridge, and in any way that obstructs more than half the width of a watercourse[612]. The Act also outlaws, unless with permission by the Minister, the introduction of any species of fish into a watercourse, the import of alive fish in Namibia and the export of live fishes declared endangered species[613]. The Act empowers the Minister to declare any area of inland waters as a fisheries reserve for conservation and fish-stock-regeneration purposes.

Drought

The 1997 Namibia's Drought Policy and Strategy address the problems that the high aridity of Namibian climate poses on agriculture and livelihoods. It aims at making livestock keepers and farmers self-reliant, so it provides for interventions only in extreme events. It proposes the elimination of fodder and forage subsidies for farmers, because they promote the unsustainable increase of livestock. Instead, the Policy encourages the sale of livestock in times of drought. In order to increase pressure on adopting sustainable practices, the Policy states that only those farmers who have implemented sustainable practices should receive drought aid.

Tourism

Tourism is recognized to be one of the most important economic activities of Namibia and is managed by the Ministry of the Environment and Tourism. The 1994 Tourism White Paper, as well as the Revised Draft Tourism Policy 2001-2010, elevate sustainability and no detriment for the environment as the core values of tourism development. They require that a part of the profits derived from tourism shall be reinvested into conservation activities.

Traditional knowledge and access and benefit sharing

The Access to Biological Resources and Associated Traditional Knowledge Bill has not yet been finalized. Currently issues concerning the protection of traditional knowledge and the sharing of the benefits arising from biological resources are dealt with by the Interim Bioprospecting Committee.

[611] (Republic of Namibia, 2003, sec. 11).
[612] (Republic of Namibia, 2003, sec. 17–18).
[613] (Republic of Namibia, 2003, sec. 19).

Chapter 5.3. *Biocultural Community Protocols*

In the last few years, *Natural Justice: lawyers for communities and the environment* has been promoting the development of Biocultural Community Protocols as instruments to increase the capacity of a community to drive the local implementation of international and national environmental laws and to promote the respect of its biocultural rights. In 2010, after more than 10 years of negotiations and thanks to the intense lobbying by indigenous and local communities' representatives and supporting NGOs, BCPs have been introduced in the text of the Nagoya additional Protocol to the CBD, so gaining international recognition. Article 12[614] and 21[615] call Parties to implement their obligations under the Protocol taking in considerations, when dealing with the access and use of natural resources and traditional knowledge, not only indigenous and local communities' customary laws but also their community protocols.

5.3.1. What are Biocultural Community Protocols?

BCPs, though they differ from one community to another, are «community-led instrument[s] that promote participatory advocacy for the recognition of and support for ways of life that are based on the customary sustainable use of biodiversity, according to standards and procedures set out in customary, national, and international laws and policies»[616]. They are documents in which a community outlines what its customary laws, local values, principles, needs and aspirations are and, on their basis, it states how, and on what terms, it wishes to engage with external stakeholders. They are documents produced after extensive community discussion and consultation organized in line with traditional decision making procedures and with the help of a community-based organization (CBO) or NGO. The aim of the discussions and consultation is to raise the awareness and understanding of the community about its biocultural rights, as recognized by international and national law. Knowledge of the relevant laws is, in fact, essential for communities to claim the respect of the rights and to negotiate with external stakeholders.

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[614] Art. 12 Nagoya Protocol: «In implementing their obligations under this Protocol, Parties shall in accordance with domestic law take into consideration indigenous and local communities' customary laws, community protocols and procedures, as applicable, with respect to traditional knowledge associated with genetic resources».

[615] Art. 2 Nagoya Protocol: «Each Party shall take measures to raise awareness of the importance of genetic resources and traditional knowledge associated with genetic resources, and related access and benefit-sharing issues. Such measures may include, inter alia: awareness-rising of community protocols and procedures of indigenous and local communities».

[616] (Harry Jonas, Shrumm, & Bavikatte, 2010, p. 109).

5.3.2. Development and Content

Usually, BCPs include the self-definition and the description of the community (i.e.: its history, its population data) and the community may decide to include the description of the natural resources of its territories, the use that it has traditionally made of them – including conservation techniques – and their relevance for the survival of the community. With more or less details the community might describe the knowledge it has about the ecosystems that surround it, the use of medicinal plants, herding, gathering and hunting practices. This part of the protocol has different functions: it regenerates the consciousness of the community about its role in the ecosystems and about the cultural background it has; it can also be a chance of exchange and knowledge transmission within the community (for example to the younger generations that spend less time with the community because of school attendance); finally it shows to external stakeholders – such as the local government or protected areas managers – the role the community has in the ecosystem, its potential in conservation and restoration projects of the area and the need to protect its traditional lifestyle and its wellbeing in order to protect the local environment.

The development of a protocol is a chance to clearly define the customary laws of the community, the rules of engagement with third parties and the terms for the access and use of traditional knowledge[617]. Since customary laws are mostly unwritten and orally transmitted, they are often unclear, even for the community members, therefore NGOs and other external agencies struggle to understand what they are and are not allowed to and how they are supposed to behave. The BCP is an opportunity for the community to think about and clarify what its customary laws are and to clearly state them in a written document comprehensible and trustable to all outsiders. In particular, even though (and because), customary laws are almost never recognised by State law, it is a way to assert their existence and importance *vis à vis* government agencies, judicial courts and local authorities. This section can also include the description of the decision making procedures of the community that outsiders need to go through in order to obtain the real free prior informed consent[618] (FPIC) of the community before accessing their knowledge or starting any other activity.

[617] (African Bio-cultural Community Protocol Initiative, 2011).
[618] The FPIC is a requirement now included in many national and international laws, in particular in the CBD and the Nagoya Protocol. It will be discussed further in Chapter 3.

The process of developing the protocol can go further, allowing the community to reflect and lay out in the document the problems that it finds more challenging at the time being and for which it might appreciate external support. Challenges may vary from land rights issues; to conflicts on the management of natural resource with other communities or with governmental authorities and private companies; from environmental changes or degradation (such as droughts, desertification, pest invasions, climate change, species extinctions); to disappearing traditional languages and practices and much more. This section is very precious not only for the community itself but also for the organizations interested in promoting the wellbeing and the respect of the biocultural rights of the community.

Depending on its needs and interests, the community can also add sections in the BCP on, for example, its sacred natural sites, its nomadic routes, the relationships it has with other communities and their importance for its livelihoods or practices.

5.3.3. Application

Given the diversity of projects and cultural and legal systems of indigenous and local peoples, BCPs act as a guide on the *process* without fixing one-fits-all norms. Thanks to their very adaptive and flexible format, BCPs can be used in very different situations. They can in fact address issues as diverse as[619]:

- Community management of biodiversity conservation projects;
- Sustainably use plants and animal genetic resources and manage the benefit arising from their use;
- Ensure environmental and other laws are implemented according to customary laws;
- Community management of protected areas and of endangered species;
- Oppose unsustainable development on their lands; and
- Engage with governmental or other agencies.

5.3.4. Process is the Outcome

The *process* itself of developing a BCP can be considered one of the outcomes *per se* because it is an instrument of empowerment of the community. The

[619] (United Nations Environmental Program, 2010).

development of a BCP allows the community the time to understand and discuss before entering in contact with outsiders, so guaranteeing a more appropriate decision making procedure. During the *process* the community gains awareness of its rights as recognized by the law, clarifies both its leadership roles and its customary laws (legal empowerment), and improves its negotiating strength with external stakeholders[620]. The process can also restore community self-consciousness, both as a collective entity and as a holder of valuable knowledge and practices. It can as well be a chance of inter-community exchange (often intergenerational) of knowledge, ideas and aspiration, increasing the community cohesion.

5.3.5. Conclusion

BCPs are not a final answer, they are aimed at building the ability to find new and value-based solutions – different from case to case. They are a tool to turn over the current tendency to propose (and sometime impose) outsiders' solutions to local problems, challenges, and environments. The aim is to allow communities to effectively lead the development and implementation of projects and rights-claims rather than passively accept the decisions of external organizations.

[620] (Salter & Von Braun, 2011).

Chapter 5.4. *Case Study*

5.4.1. Bwabwata National Park

Map showing Caprivi Strip

Bwabwata National Park is situated in the Caprivi Sprit, a long protrusion of about 450 Km of Namibian territory that extends towards Zambia and Zimbabwe and that borders with Angola and Botswana. Caprivi Strip became part of Namibian territory in 1890, six years after Namibia became a German colony[621]. Namibia, under the name of South-West Africa remained under German domination until the end of World War II, when the League of Nations placed it under the control of South Africa.

In 1963, putting aside an South African apartheid plan to turn Caprivi Strip in a San-people area, the Strip was proclaimed West Caprivi Nature Park[622]. In 1968 it was upgraded to Caprivi Game Park but did not function as a Park for long because in the same year it was turned in a military zone of the South African

[621] (Dain-Owens, Kemp, & Lavelle, 2010, p. 1).
[622] (Dain-Owens et al., 2010, p. 2).

Defence Force (SADF), because strategically important in the Namibian independence war. In 1966 in fact, the UN had declared South African occupation illegal and the refusal of South Africa to grant independence spawned the war against the South West African Peoples' Organization that was fighting for Namibian independence. The Khwe people of Caprivi Strip were involved in the military activities and were forced to leave their territories and to reside in army settlements[623]. When, in 1990 the war ended and Namibia gained independence, the San found themselves lacking any governmental support because they were accused of being allies of the South African forces[624].

In November 2007, the area between the Okawango and the Kwando rivers was proclaimed Bwabwata National Park. The Park covers an area of 6.274 Km^2 of Savana biome where, through the many vegetation types, Kalahari woodland prevails[625]. The Park is divided in two by a gravel road along which the main settlements are distributed (it is estimated that above 20 settlements ranging from 12 to 100 inhabitants are present)[626].

BNP is one of the few national parks in the world where local people live[627]. Since they live in a National Park, they cannot ask for the creation of Communal Conservancies[628] and, unless there is a change in legislation, they are doomed to remain uneasy inhabitants of the Park with little benefits and many restrictions. In order to manage the coexistence of peoples and natural resources the Park has been divided in two types of areas:

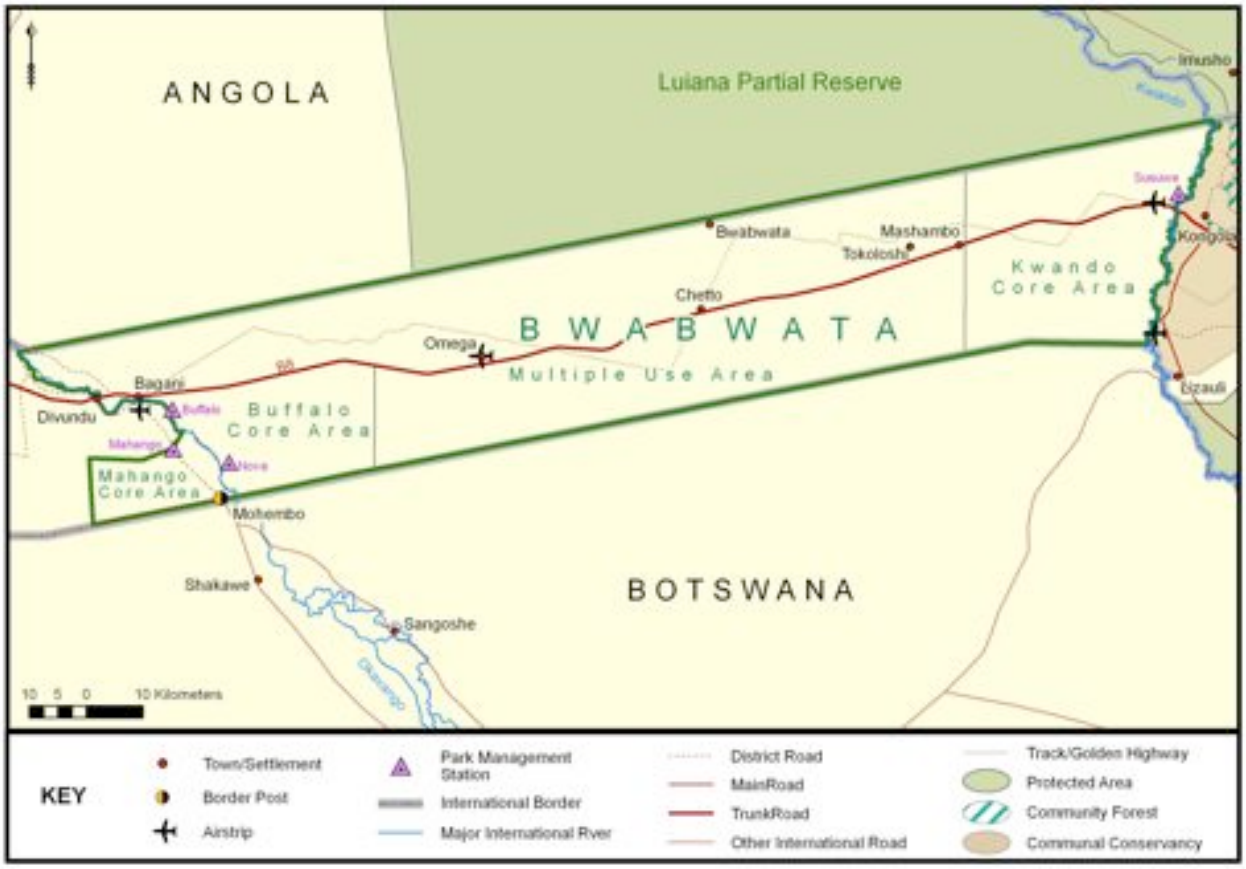
- 3 Core Areas (Mahango, Buffalo and Kwando) with special protection and controlled tourism. Here veldt product harvesting, hunting, cattle rearing and wood collecting are not allowed;

- 1 large Multiple-use Area where community-based tourism, trophy hunting, human settlement and development is allowed, though with limitations. Here residents are allowed to live, to plough, to collect firewood, bush food and building or other raw materials for subsistence purposes.

Any commercial use of land and natural resources within both areas of the Park, where permitted, needs to be authorized by the MET.

[623] (Boden, 2011).
[624] (Boden, 2011).
[625] (Dain-Owens et al., 2010, p. 8).
[626] (Dain-Owens et al., 2010, p. 8).
[627] (Dain-Owens et al., 2010, p. 1).
[628] See above at 5.2.5.

Map showing the Multiple Use and Core Areas of Bwabwata

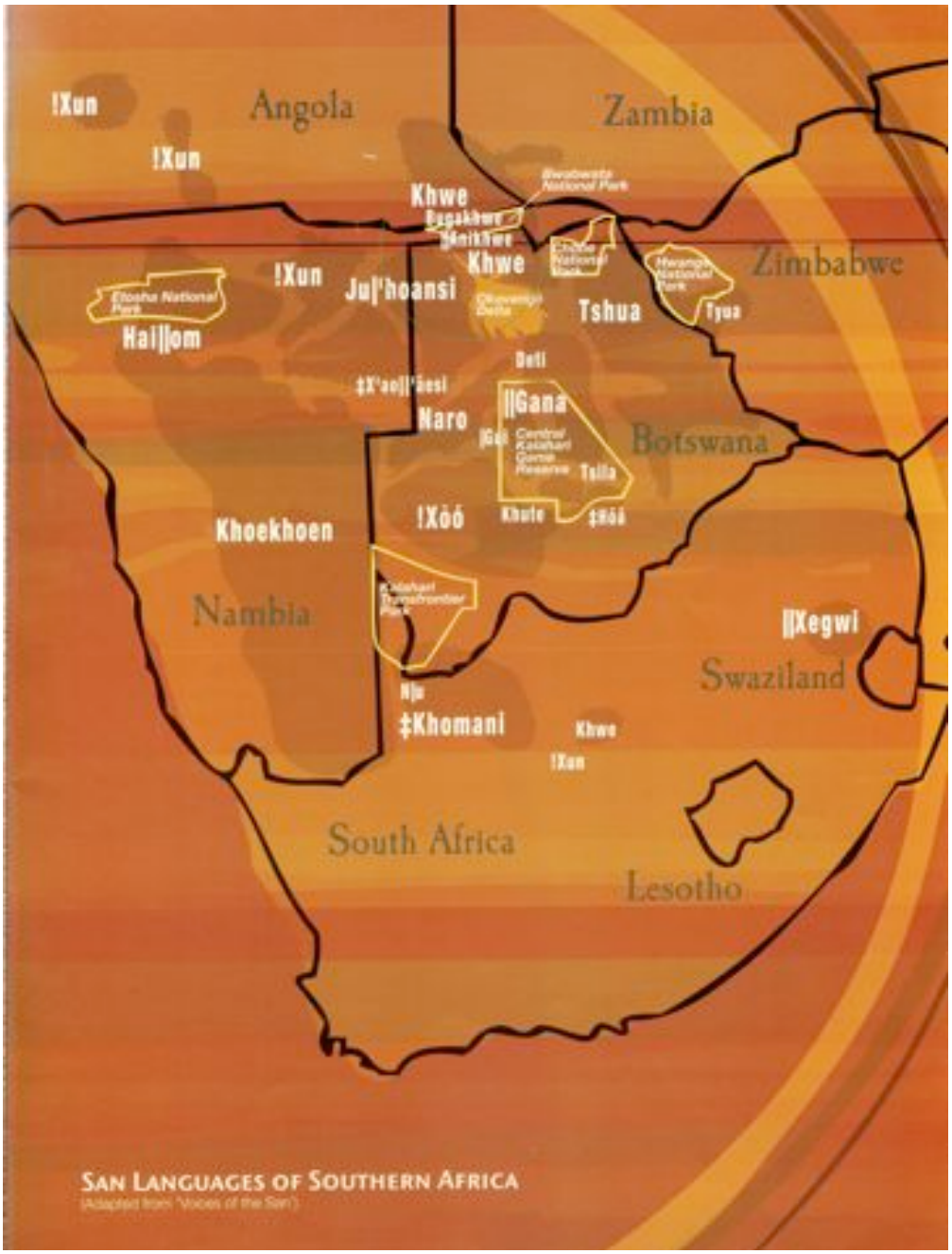


5.4.2. The Khwe

San People

The first inhabitants of the Southern part of Africa were organized in several tribes of nomadic people that called themselves: Ju|'hoansi, Khwe, ||Ani, G|wi, Naro, Hai||om, !Xoò, #Khomani, !Xun, ||Gana, Tshua, ||Xekgwi, !Ui[629].

[629] (Le Roux & White, 2004). The / ‘ ! # symbols indicated the different click sounds of the San language.



Map of the San tribes of Southern Africa[630].

Each tribe had little contact with the others, but they all shared the same hunter-gatherer livelihoods, a similar click-sound language, traditional dances and rock art. For at least 20.000 years they lived in the area now encompassed between the boundaries drawn by the European colonizers of Angola, Botswana, Namibia, South Africa, Zambia and Zimbabwe. Throughout millennia of life in the desert

[630] (Kuru Family Organizations, 2008).

and semi-desert African lands the San learnt to live on the rich biodiversity those lands had to offer and to take care of it for the present and future generations[631].

In less than 2,000 years, since the arrival of the Bantu and the Europeans, more than 300.000 San turned from being the ancient and unique lords of their lands to being «the most impoverished, disempowered, and stigmatized ethnic group in Southern Africa»[632]. Today, only approximately 88,000 San remain. Most of them live as marginal poor struggling to make a living in the new market-economy world, lacking rights over their lands and the education to fully integrate[633].

In Namibia there are about 30.000 San, divided in at least 5 language groups and located in different areas of the Nord-east of the country[634]. Most groups live in the less valuable lands of Namibia, because since the XVI century they have been pushed at the sides of their original territories by Bantu migrations coming from the North[635]. Today, the San are the most marginalized ethnic group in Namibia, facing problems such as poverty, powerlessness and social disorganization and mostly living in white-owned farms, other ethnic groups' lands and in government lands[636].

The Khwe of West Caprivi Strip

The resident population of West Caprivi numbers approximately 5000 adults, of whom 82% are Khwe (San) and 18% Mbukushu, a Bantu people that moved to area the about two hundred years ago[637].

The Khwe, even though they have traditionally lived in the area, have never been granted official recognition by the national government because being nomadic communities they do not fit the requirements of land possession that the government aspects and because, traditionally, they did not have a central authority to be recognized but a number of local ones[638]. Since 1989 they have created a centralized authority but it has not, as yet, received any official recognition as Khwe Traditional Authority[639]. The Khwe (unrecognized) Traditional Authority has had many leadership problems, due to the chosen leaders (acting for their own interests or encountering legal and alcohol-addiction

[631] (Le Roux & White, 2004).
[632] (Sylvain, 2002).
[633] (Suzman, 2001).
[634] (Legal Assistance Centre, 2006, p. 1).
[635] (Legal Assistance Centre, 2006, p. 1).
[636] (Legal Assistance Centre, 2006, pp. 2–3).
[637] (Dain-Owens et al., 2010, p. 2).
[638] (Dain-Owens et al., 2010, p. 2).
[639] See above at 5.2.5.

problems) as well as to issues concerning communication between the communities spread in the Park[640]. Many Khwe have reported confusion concerning who the current members of the Traditional Authority are and are *de facto* ruled by the Mbukushu leaders[641]. In fact, unlike the Khwe, the Mbukushu's Traditional Authority has received official recognition and now proclaims that the Khwe are not a distinct people, but rather their former subjects, that, as such, need no further official recognition[642].

The Khwe are currently supported in their life within the Park by the work of Integrated Rural Development and Nature Conservation (IRDNC) a Namibian NGO[643]. Since 1994, 43 community members have been involved in a program for the management of the Park. They act as Community Game Guards and as Community Resources Monitors and work inside the park to monitoring wildlife and poaching, monitoring the collection and use of medicinal and food plants and advising and teaching community members to use sustainable techniques[644]. Besides this, in 2000, IRDNC has supported the Bwabwata residents to create the Kyaramacan Peoples Association. It is the legal body that represents all the residents of the park, from the various ethnic groups, in issues concerning the management of natural resources (previous authorization of the MET) and the distribution of benefits generating from their use. In particular for the distribution of benefits from trophy hunting and the organic harvesting of the Devil's Claw[645]. However, since 2010 the MET has not granted any hunting concessions hence no benefits have been distributed[646].

In 2010, IRDNC commissioned a study to the Round River Conservation Research Centre on the current status of the livelihoods of the Khwe and on their impact on

[640] (Boden, 2011).
[641] (Boden, 2011).
[642] (Legal Assistance Centre, 2006, p. 6).
[643] It is a no-profit organization that focuses on community-based natural resources management in Caprivi and Kunene Regions. It is dedicated to wildlife conservation, rural development and democracy building. IRDNC has acted as a bridging organization between the communities and the government and has worked to establish forms of community-based natural resources management with the Khwe (Taylor, 2005, p. 37). For more information visit their official website at: http://www.irdnc.org.na/.
[644] (Taylor, 2005, p. 37).
[645] The Devil's claw, *Harpagophytum* species (D. Cole & Stewart, 2005), analgesic and anti-inflammatory properties have long been known in the traditional system of the San and earned it a place in the European market since the mid-twentieth century (D. Cole, 2009). Until 2007 the Park was characterized by large scale unsustainable and illegal harvesting of Devil's claw for poor prices paid to harvesters and poor quality of harvested material. In 2007, with the assistance of MET and IRDNC, KA established a Devil's Claw Management Plan that introduced rules on harvesting methodologies and monitoring activities. KA organized trainings for the harvesters, registered them and obtained the certification of organic products for the Devil's claw. The income of the harvesters increased by three times and the sustainability of the resources use was registered as increased.
[646] (Dain-Owens et al., 2010, p. 4).

the conservation of biodiversity in the park. The study has reported that the Khwe communities living in the Park rely mostly on natural products for food, building materials and medicines: they gather veldt products, such as fruits and roots, as well honey, reeds, grass and wood, and very limited small animals' hunting[647]. Trough extensive interviews within the Park, the Report has recorded the use of 135 plant species as among the important food sources for the Khwe and 103 as the most important for medicinal and cultural purposes[648]. Many of the alimentary and medicinal plants traditionally used have been reported as inaccessible or very scarce in the Multiple-use Areas[649], and present only in the Core Areas. Due to limited access to the Core Areas of the Park, those richest in biodiversity, and to the ban on gathering and hunting within those areas, the traditional livelihoods of the communities are not anymore sufficient for their survival and they have had to increasingly rely on external aid, jobs and limited agriculture[650]. Agriculture is limited because of the lack of water and because of conflicts with wildlife: 40% of the interviewees declared elephants to be a treat to their crops and lamented that there was no compensation for damaged crops by the MET[651].

The Report accounts for the lack of a balanced diet for the inhabitants of the Park because of the almost complete lack of protein due to the ban on hunting and the absence of income necessary to buy meat products[652] (moreover, the food store are very few and mostly unreachable for the majority of inhabitants because of the lack means of transport).

Beside subsistence problems, the lack of access to core areas also limits the ability of the elders to teach to new generations their knowledge and practices about land, animals and plants. The Round River study reports that «the new lifestyles have distances the Khwe from their cultural traditions and led to a loss of local ecological knowledge»[653].

Cohabitation with the Mbukushu is also uneasy, not only because of their attitude towards the Khwe, but also because they traditionally are cattle holders. In the last few years and increasing number of Mbukushu have settled within the Bwabwata National Park boundaries and have brought their cattle along. Even though it is formally prohibited to import any animal within a national park, they have settled

[647] (Dain-Owens et al., 2010).
[648] (Dain-Owens et al., 2010, p. 13 and 46).
[649] (Dain-Owens et al., 2010, p. 70 and 74).
[650] (Dain-Owens et al., 2010, p. 5).
[651] (Dain-Owens et al., 2010, p. 59).
[652] (Dain-Owens et al., 2010, p. 71). In most households the sole source of income are old-age pensions granted by the government for people over 60s (Boden, 2008, p. 143).
[653] (Dain-Owens et al., 2010, p. 5).

in the Multiple-use Areas, that, unlike the Core Areas, are not well patrolled by the Park officials and rules are not always implemented. The Khwe, that traditionally have neither cattle nor crops, are hunter-gathers and have found themselves limited by the cumbersome presence of (illegal) cattle and the (legal) limitations on hunting and gathering imposed for the conservation of the park.

5.4.3. Khwe Biocultural Community Protocol: Development and Process

In 2011, Natural Justice (NJ) organized in Windhoek a workshop in collaboration with the Legal Assistance Centre of Namibia on Biocultural Community Protocols as instruments for the promotion of biocultural rights of indigenous and local communities[654]. Inspired by the workshop, the year after, the IRDNC and the Kyaramacan Peoples Association invited Natural Justice to visit the Khwe communities in the park to assist them in the recognition of their relationship with the park environment and in the negotiation of greater rights to access and use resources within its borders in order to overcome their livelihood and cultural-loss problems. After a first round of consultations and awareness rising about BCPs, in 2012 Natural Justice was mandated by the communities to assist to develop their Protocol[655].

Community consultations: BCP first Workshop with Custodians Committee of Elders & Youths

The BCP first Workshop with Custodians Committee of Elders and Youth was organized by Natural Justice, in collaboration with CIKOD (Centre for Indigenous Knowledge & Organizational Development, Ghana) and the IRDNC from the 23rd to the 26th of September 2013. The workshop was attended by the custodians committee, composed of: 2 women and 2 men elected by the Khwe communities to lead them in the development of a BCP - called the custodian committee; 28 elders and youths selected in each of the 12 Khwe villages of the Park; and a team of 4 Khwe and members of TOCaDI[656] from Shakawe, Botswana. The workshop consisted of four intensive days dedicated to the following activities.

[654] (Natural Justice, 2012, p. 9).
[655] (Natural Justice, 2013, p. 9). The project is funded by the African Biocultural Community Protocols Initiative. A Natural Justice-led initiative aimed at supporting communities to develop BCPs, training of BCP facilitators and developing BCPs' best-practices.
[656] TOCaDI stands for the Trust for Okavango Cultural and Development Initiatives, an NGO that works in the Okavango sub-district in Botswana for the promotion of land rights of local marginalized communities, in particular, but not only, San people. For more information visit the official website: http://www.kuru.co.bw/TOCaDI.html.

Day 1:

- *Introduction by the custodians committee on their mandate, objectives, fears and expectations from the BCP process.*

Pics. 1 and 2

Two of the four members of the custodian committee spoke one after the other (one in English and Afrikaans, the other in Khwe was then translated by a young community member) and drew the picture of a house filled with symbols (picture 1). They explained that the house represents the culture and knowledge of the Khwe and the symbols drawn inside stand for (from left to right): the fire, initiation ceremonies (a stick with a drop of blood), the village and its inhabitants, hunting practices (the bow), the animals of the Park (an animal track), the documentation of their traditional knowledge (a book and a pen), their need to walk back to the house (a human footprint). The family drawn outside the house represents all the Khwe of Bwabwata National Park that are now, they explained, outside the house of traditional practices and culture. They are far from it because they cannot make fires in the veldt, they cannot gather all the plants they need for their ceremonies, they cannot hunt the animals of the Park and hence, they are

loosing their traditional knowledge. The last two symbols represent what they would like to do: to record their traditional knowledge in a written form and to walk back inside the house. The creation of a written record of their traditional knowledge has already been started with the help of IRDNC and would be, they said, very useful to teach their children about their practices. A draft of the book, called *San Values* was showed to the group (picture 2). The kids, they explained, mostly go to school and can read. But they cannot learn the traditional practices of their fathers because they spend a lot of time in schools (schools are far and they most often have to be hosted there for the school months) and because they do not have access to the areas of the Park where most of the animals and plants are. During the discussion, in fact, one of the elders noted that the book alone is not enough because "the children need to see things with their eyes. They should learn to prepare the bow and the arrows, and should go with the hunter to see the footprints, the killing, the lying down animal, and the skinning. But the government is not allowing it anymore".

- *Introduction on indigenous peoples' rights and BCPs.*

Natural Justice lawyer, Lesle Jansen, gave an overview of indigenous peoples' rights in international law (with particular focus on the CBD) and in Namibian human rights and environmental law. She then explained what a BCP is and how it could be used by the Khwe to improve their lives within Bwabwata National Park. In particular she suggested actions of lobbying with the local MET authorities in conjunction with IRDNC and the KA.

- *Introduction on the tools used during the workshop.*

CIKOD moderator, Wilberforce Laate, described the tools used to collect information during the workshop:

Community Institutions and Resource Mapping (CIRM)[657]. The aim of this tool is to teach to the selected workshop participants to collect from the community data on the formal and traditional institutions that are charged of taking decisions, and on the human and natural resources that are available. Data is collected by small teams of workshop participants that are sent to the communities to make interviews and to draw maps of the resources. In the first step the workshop participants are invited to brainstorm the institutions and resources they think the community has. Then the questions to be posed are framed with the support of the

[657] (CIKOD, 2013).

moderator. A role-play helps the teams to get familiar with the questions and the mapping and finally, the teams are sent to the community to collect the information and draw the maps. Last step is the validation: the workshop participants discuss the information collected and *validate* them on the ground of their knowledge.

Community Visioning and Action Plan[658]. Trough structured questions the facilitator leads the community to come out with their dreams of what they want with regards to their institutions and resources previously identified. The first part focuses on the issues of the community. The second part is dedicated to identify the priorities of the community and its development needs and to develop concrete action plans to achieve its goals.

- *First steps of CIRM: framing the questions to be asked in villages to gather information on institutions and resources.*

What are the institutions/people responsible for the following resources?

- Forest
- Water
- Animals
- Land in Multiple-use Area
- Land in Core Areas
- Food plants
- Medicinal plants
- Sacred places
- Ceremonies
- Human-made fire
- Wildfire
- Tracking
- Hunting

[658] (CIKOD, 2013).

- Festivals
- Meat distribution
- Healing ceremonies
- Gathering

What type of food plants/building materials/medicinal plants/animals/water/lands do you have and use?

Can you find them in the Multiple-use Area?

Can you find them in the Core Area?

What you can find is enough?

- *Participant's introduction to mapping.*

CIKOD moderator showed the participants how to draw maps on the ground and then invited them to draw a map of the villages of the Park in order to get confident with the tool (picture 3).

Pic 3. First attempts at drawing a physical map

- *Second step of CIRM: role-play.*

Participants were divided in 6 groups: three asking the questionnaire and the other three acting as groups of women, elders and youth to be interviewed. They collected data on the institutions and resources and then drew maps of the location of the resources.

- *Report of the role-play.*

The interviewers groups reported on the answers they had received and explained the meanings of the maps the interviewees had drawn.

All the participants then reflected, in preparation for the following day of fieldwork, on the difficulties they had experienced.

DAY 2:

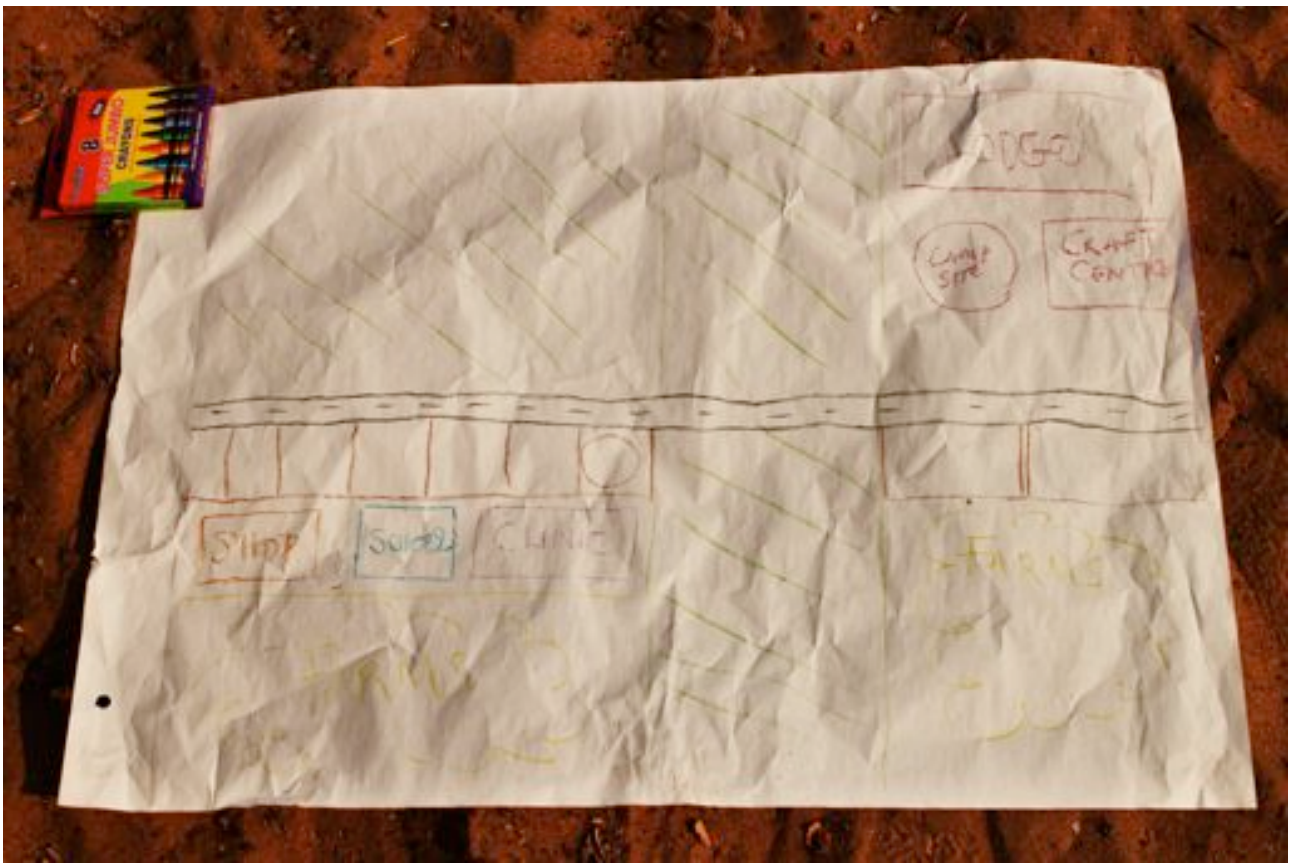
- *Third step of CIRM: interviews in one of the villages.*

Workshop participants, divided in three groups, visited a close by Khwe village, and asked the agreed questions to the community members. One group questioned the elders, one the women and one the youths. Each group responded to the questions and prepared a map representing the distribution of resources.

The groups that interviewed the elders and the women (picture 4) collected the lists of resources used by the community members. These lists (reported below after the *validation* process) showed the use of many plants species for food and medicinal purposes and indicated the people and institutions responsible for their management. The women lamented the presence of many restrictions on the collection of the resources. Even if some food sources are present nearby they cannot harvest them or fish them and in particular they said they are afraid of being arrested if caught while harvesting. In fact, they said, they took most of the food they used from the nearby shop. Water sources, they said, are also very limited and they take most of the water from the river, regardless of the presence of crocodiles. For what concerns lands they reported a lot of confusion and conflicts with other tribes and said that, while there used to be a division, “now it is like a squatter camp”.

Pic 4. Group collecting information with the women

Pic 5. Map drawn by the youths



The group of the youths engaged in a slightly different enterprise. They became very excited and decided to draw a map of how they would like the area to become. They draw a map (picture 5) that showed their will to expand the Core Area close to the village and to be helped to create a school, a clinic and a shop close to the village. They also drew a lodge with a campsite and a craft centre that they would have liked to manage. Besides the lodge and the expanded Core Areas they said they would like to create farms where to grow food for the village.

DAY 3:

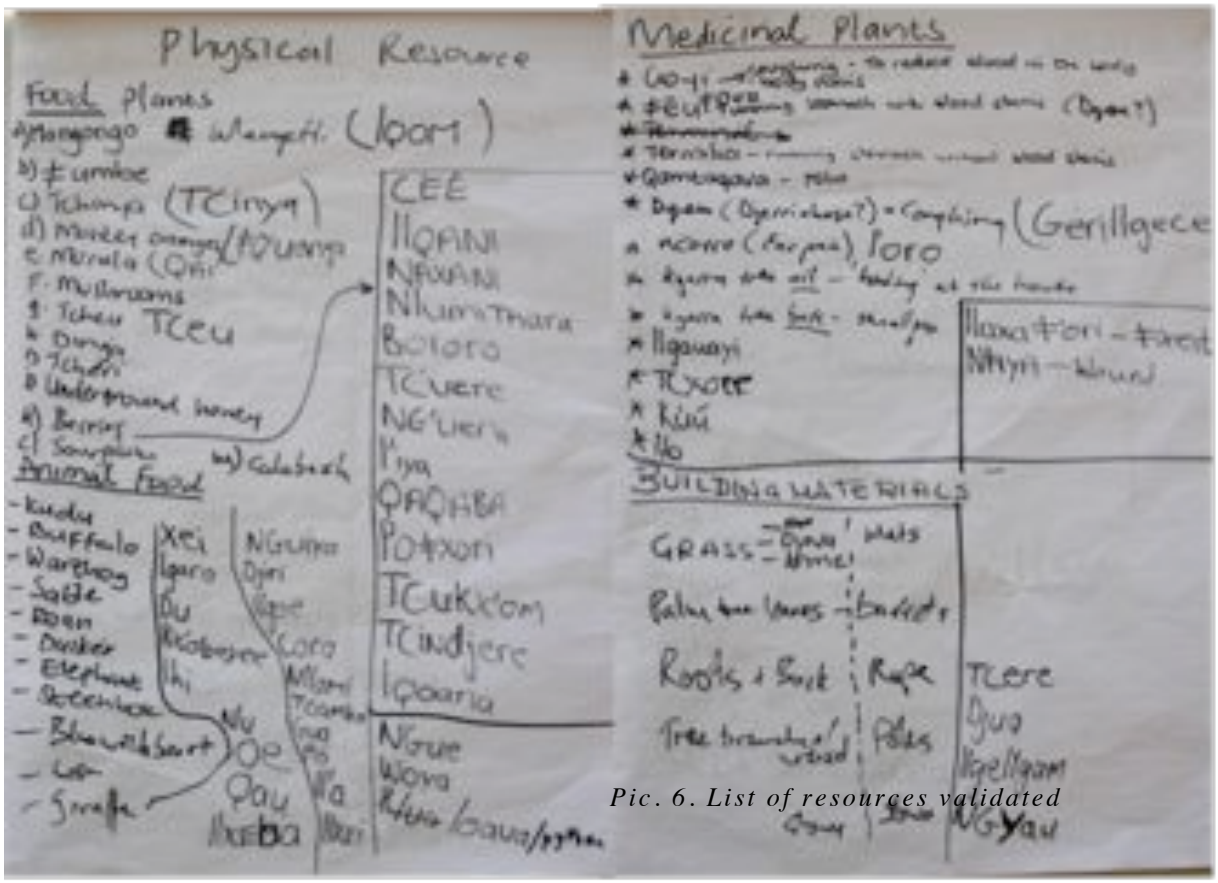
- *Groups' leaders report on the findings of the previous day.*
- *Presentation by the Botswana team on its work with TOCaDI in the Okavango Delta.*

As an example of *best practice*, the team explained how they have used community maps to claim for recognition of land rights.

- *Validation of the information collected in the village.*

The workshop participants went trough the information collected in the village about the resources used and the institutions and people that control them. After extensive consultations, the participants added a few more resources that they thought important for the Khwe and changed some of the indications about the institutions and people in charge of managing the resources thanks to the help of representatives of the KA and of IRDNC.

The collection of this data, reported in the figure below (picture 6) was very relevant for the next steps of the workshop. The participants could focus on the resources they have, the areas where they are found, the challenges they encounter in accessing and using them. It stimulated their thoughts about the current situation within the Park and about what they feel their main problems are. This exercise revealed to be fundamental for the elaboration of the Community Vision and Action Plan.

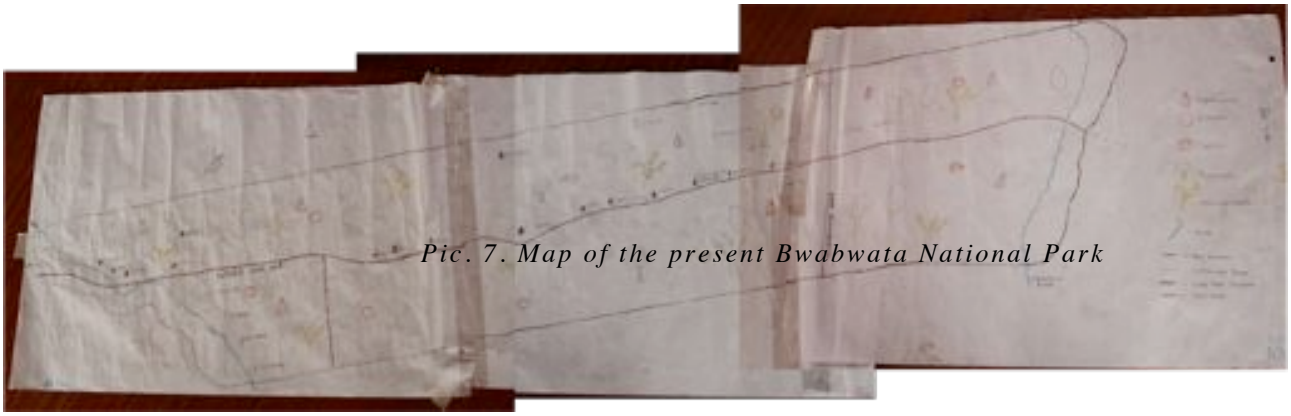


Pic. 6. List of resources validated

DAY 4:

- *Creation of a map representing the present distribution of resources in the Park.*

The participants were invited to draw a map of Bwabwata National Park and to point where main resources are found (picture 7). They drew many resources in the Multiple-use Area but specified that certain ones, in particular certain medicinal and food plants, were present only in the Core Areas.



Pic. 7. Map of the present Bwabwata National Park

- *Community Vision and Action Plan.*

The workshop participants showed a strong desire for an increased access to the Core Areas, both to gather plants unavailable, or scarcely available, in the Multiple-use Areas, and to transmit to the new generations knowledge about their territory, their uses and their management practices. On the ground of the map of the present drawn the day before, the participants were invited to draw another map representing the changes they would have liked to fight for (picture 8).

They drew a map showing the reduction of the Core Areas and the increase of the area within the veterinary fence (where cattle usually is kept). In particular they suggested shifting the boundary of the Kwando Core Area so to reduce its size. On the other side of the Park, they have suggested to shift the boundaries of the veterinary fence so to increase the area where cattle and other animals can move. In this way, they said, the villages will have more access to the resources currently in the Core Areas (hence restricted) and will have more space to keep their animals.

After drawing and explaining their first proposal, the workshop participants were invited to reflect on two points. If the Core Area is restricted the Multiple-use Area, where they have more conflicts with the Mbukushu owners of cattle, will be expanded. And this might increase the conflicts rather then reduce them. Moreover, the shift of the veterinary fence will increase once more the area occupied by the Mbukushu, as they are the only owners of cattle. Moreover they were invited to reflect on whether it really is the way they plan to “walk back to the house of the Khwe traditions” as they said on the first day.

In the next page: Pic. 8. Map of Option 1 for the future of the Park

After more consultations among them, the custodian committee said that the participants had agreed on a second option. It required to define the specific needs of the communities and to agree with the park management authorities on special permits to enter the Core Areas at certain times of the year, along with the following requirements: seasonal access to collect medicinal plants and food plants unavailable in the Multiple-use Areas; organize periodic trips in the Core Areas, accompanied by park authorities, to teach the youths knowledge about the Park; have new permits for hunting a few animals a year. The Round Rivers research reported above[659] provides details on the plants, animals and water sources mostly needed and not available or sufficient in the Multiple-use Areas and on the seasons and location of each plant species. It was proposed to use it as the source of information to negotiate new access rights to the Core Areas.

Community consultations: future steps

The workshop has showed the great interests of the custodian committee to continue the process of development of a BCP. The data collected in this first round of negotiation is not sufficient to write the final BCP. The next step will require legal-awareness rising within the custodian committee and the elders and further consultations in each of the other 12 villages in order to understand what their Community Visions are. Hopefully the 12 villages will provide community visions compatible with each other and still so strongly focused on the will to live in harmony with the Park.

[659] See above at 5.4.2.

Chapter 5.5. *Bwabwata Biocultural Community Protocol*

Here is provided the current draft of the Biocultural Community Protocol of the Khwe of Bwabwata that was prepared in the second round of negotiations conducted by Natural Justice, in February 2014. It will have to be adapted and extended after consultation with the other villages.

5.5.1. Our Communities Values

In our culture and tradition there four important natural resources that we value in our life and throughout.

The Land

Our land is most important to us, we feel safe on our land, and we consider it as our homestead. The way we lived in the past is also important to us, especially hunting and gathering.

In the same vein, animals and plants are important to us because it is where we get our food and medicine.

The Eland

The most sacred animal to us is the eland, when the eland meat is brought home, no argument should be observed otherwise the ancestors will curse the ones who initiated the arguments.

We use the animal skin to make blankets, shoes and the fat for instigating a ceremony as well as healing the environment so that the environment does not die and to heal persons with eye and chest problem.

We only hunt the old male eland, we do not hunt the female for the purposes of reproduction. The meat was kept for a period of time to reduce hunting and preserve the eland. We also hunt far from our homestead.

The Kyara tree

We use the Kyara tree to make our cooking oil from the Kyara kernels. The old men of the family then take the Kyara oil and use it for healing people in the village. We use the oil to smear on the leg, chest and the face of the hunters when

they go hunt so that they may be successful and the oil is also similarly smeared on the hunted meat. We also use the oil for the initiation ceremony

The oil is only harvested during certain periods normally from November to April, otherwise the person brings bad luck on to them if harvested during other periods. In this way we conserve and protect our Kyara tree. There are also certain plants in our Tradition that our culture does not allow to be touched nor harvesting.

Wild animals

Like everyone else in Namibia, we also have great value for our domestic animals. Our elders have taught us how to live with the wild animals; we consider them as our herds and flocks.

5.5.2. Managing our Environment

The environment is the most important element to us. The old man of a homestead is normally the one that informs the young men of our community about the reproduction of a plant , in order to the start the burning earlier so that the tree can produce healthy.

Burning of the environment early is very important to us, we normally do it in April to July, this is the best time to initiate burning, however if the rain was not that good the previous year then burning of the environment is stopped early normally in June.

Harvesting of a plant is only allowed when the old man of a homestead announces harvesting, thus, the first ready fruits are brought to the old man of the family before he can announce harvesting. If anyone was found harvesting an unripe plan tree the person together with their family was chased away from the village.

Deforestation, cutting down of trees is not allowed in our community. We normally climb on the tree, to remove the ripe fruits to avoid breaking the shrubs of the trees.

5.5.3. Our Traditional Knowledge

We hold variety of traditional knowledge which has developed from time in memorial from our ancestors. We are known for our healing knowledge to our people and to our environment.

Knowledge pertaining to plants

We collect the dry wood of the Teak tree, we then cut it and remove the red part which is found in middle of the dry wood. Pound and get the power, which we serve to get the finest power. With this power we use it to heal somebody who is sick and we also use it for offering to our ancestors when we communicate with them. We also use the red power to smear on the tools of the hunters so that the ancestors can bless the tools.

If someone from the village had gone for a very long time when they return home we also smeared the powder on their heads that symbolises blessings from ancestors.

We use the seeds of a certain tree, to suppress hunger when it's ready for harvesting. Either it normally prepped with boiling water or cook it in meat, it should be prepared in a correct way and eaten responsibly as it is very poisonous. The leaves of this tree can also be used to heal diarrhoea and eye problems.

We hold knowledge on storage of our wild fruits so that they last longer. We put our fruits in holes and cover with them with a bulk of a certain plant, leaves of a certain tree and then sand on the top.

5.5.4. The Preservation of our Knowledge

We pass the knowledge that we hold to our young ones during our traditional fire assembly and through learning by doing.

- Learning by doing

As we demonstrate to our children how to use the knowledge. A male child follows the father in the field to learn the tactics of hunting and whether a certain animal was nearby the homestead or far away. On the other hand a girl mostly spent time with the mother to learn the gathering methods.

- Traditional fire

We have two types of fire in our tradition, Men fire where only the young men and the old men of the family come together to discuss and share men activities. During this fire assembly, we also discuss our knowledge that we hold. All the young girls and the old women of the family gather together to discuss women responsibility as well as passing on traditional knowledge.

5.5.5. Communication Structure of our Community

This protocol reaffirms our right to Prior informed consent to be sought before the implementation of any activities on our land. We will therefore not consult with anyone who wants to access our traditional knowledge and natural resources without having gone through our custodian committee, which has been elected by our community. After a researcher, Non-governmental Organisation, or government has consulted with our custodian committee about the content of the meeting, the custodian committee must then set up a meeting with our community that must then decide whether to meet up with such a person or not.

5.5.6. Challenges and Vision

Challenges

- *Our biggest challenge is the fact that we have no Traditional Authority of our own tribe to lead and represent us at a national level. We call on the Republic of Namibia to give us the opportunity to elect our own leaders and give them the recognition they deserve.*

- *At this stage, we feel that we have no control over our land we are living on. We are not fully recognised and respected by other tribes who often tell us that we live on land that does not belong to us, but which belongs to animals.*

- *There is an increase on deforestation, as many people are cutting down our trees in the park. It is difficult for us to get enough food and get the right medicines from our trees as other people cut down our trees without differentiating between medicinal trees and wild fruits.*

- *Our wild animals are being poached a lot by other tribes who are allowed to reside in the park with us; we recommend that the government employ people from our community to protect our wildlife, as we know the value of wild animals to us.*

- *It is also a challenge to see other people bringing their cattle and cows for grazing in the park. Our community is not allowed to have domestic animals in the park.*

- *We also feel that our community has lack of access to justice, as they know little about their rights and freedom. We therefore request from our*

government to put programs in place to educate our people about the our rights and freedom both under national and international law.

- *Lack of proper consultation between our community and government officials when implementing activities on our land.*
- *Most of our medicinal plants are fenced in the core area were we are not allowed to harvest, we therefore meekly request that we are allowed to harvest on certain periods. We can work on an agreement with the government regarding this.*
- *Our community experience human and wildlife conflict of which response from the Ministry is not fast enough.*
- *Our communities who are unable to understand English are unable to know national news and international news as the news on the radio and newspaper to not have it in our language.*
- *Currently our community is dying slowly as we are restricted to harvest certain fruits to treat each other, thus we are unable to harvest our medicinal plants to heal our people and our Environment.*

We urge the Republic of Namibia to give us access to the resources we need in the park. We appreciate the concession that our government give us for five years, they are working together with us through the Kyaramacan. We are not able to have cattle in certain areas, however the neighbours have cattle in restricted areas at the same time the cattle is sent in the park.

Chapter 5.6. *Analysis of the Protocol Under the Light of Biocultural Rights*

The Khwe-Bwabwata case study is a clear example of the conflicts that can arise between conservation goals and human rights, in particular indigenous peoples and local communities' rights. Biocultural rights can play an important role in this case, by underlying the attitude and knowledge of the communities towards the environment and their potential contribution to its conservation. The Khwe are, in fact, *de facto* supporting park authorities through their work as community resource monitors and community game guards and require more access to the park for access to livelihoods but also to transmit to future generation that same knowledge that will be needed for the next generations of game guards and resources monitors. Besides their knowledge of the Park, the Khwe have also maintained, through the transmission of traditional knowledge and practices over the past hundreds of years, ways of life that do not require cattle keeping nor agriculture, two practices not compatible with the conservation of the Park. At the same time, as a Ministry of the Environment official attending the workshop underlined, a hungry people will not refrain, autonomously, from hunting and gathering at an unsustainable level. Limits need to be imposed and enforced from the outside. This is true, unless there are strong institutional structures in the group that are able to control effectively the action of the members and that are conscious of the consequences of unsustainable uses. Whether these structures are present inside the Khwe is not confirmed by the consultations, while it is confirmed their attachment to the Park as a gift of God, to be used as He wishes, and the centrality Park resources have for their livelihoods and identity. While the first option proposed by the workshop participants does not appear as really compatible with the conservation of the Park, the second option shows their will to have more access to resources while at the same time to being ready to accept limits for the benefit of the Park.

The one reported here was just a first round of negotiations and more will be needed to understand whether the Khwe of Bwabwata are ready to ask for the recognition of biocultural rights, or whether they will rather take the route of indigenous right. Until today, their requests framed under the label of indigenous rights have been ignored by the Namibian government, both because of its attitude towards the Khwe, still seen as traitors of the country, and because it sees in Bwabwata National Park an important environmental conservation hotspot and the sources of income from tourism.

Whether or not the Khwe will choose the route of biocultural rights will also depend on their willingness, as a group, to undertake responsibilities towards the Park. As it was stressed during the workshop and as will need to be stressed in the

future consultations, biocultural rights can turn out to be, in their case, a very useful tool that comes, however, with a price to pay: the responsibility to promote the conservation of the environment.

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